DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-1347
Title: Jeffrey Lee Chafin, Petitioner
v.
Lynne Hales Chafin
Docketed: May 9, 2012
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (11-15355-CC)
Decision Date: February 6, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
May 7 2012	Petition for a writ of certiorari filed. (Response due June 8, 2012)
Jun 8 2012	Brief of respondent Lynne Hales Chafin in opposition filed.
Jun 20 2012	DISTRIBUTED for Conference of September 24, 2012.
Aug 13 2012	Petition GRANTED.
Sep 14 2012	SET FOR ARGUMENT ON Wednesday, December 5, 2012.
Sep 26 2012	Joint appendix filed.
Sep 27 2012	Brief of petitioner Jeffrey Lee Chafin filed.
Oct 2 2012	Record received from U.S.C.A. for 11th Circuit. (1 box)
Oct 4 2012	Brief amicus curiae of the United States filed.
Oct 4 2012	Proposal of the Solicitor General to lodge copies of a decision by the Constitutional Court of Spain, translated, which is cited to in their amicus curiae brief.
Oct 4 2012	Brief amicus curiae of National Center for Missing and Exploited Children filed.
Oct 17 2012	CIRCULATED.
Oct 22 2012	Record from U.S.D.C. for Northern District of Alabama is electronic.
Oct 29 2012	Brief of respondent Lynne Hales Chafin filed. (Distributed)
Oct 29 2012	Proposal of respondent to lodge copies of documents from the Sheriff Court of South Strathclyde, Dumfries & Galloway at Airdrie, Scotland, which are cited to in her brief, petitioner's and the brief of the United States.
Nov 5 2012	Brief amicus curiae of Centre for Family Law and Policy filed. (Distributed)
Nov 5 2012	Motion for divided argument filed by respondent Lynne Hales Chafin.
Nov 5 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 9 2012	Petitioner's opposition to motion of respondent for divided argument.
Nov 20 2012	Motion for divided argument filed by respondent DENIED.
Nov 20 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae

and for divided argument GRANTED.

Nov 21 2012 Reply of petitioner Jeffrey Lee Chafin filed. (Distributed)

Nov 29 2012 Proposal of respondent to lodge copies of the Notice of Intention to Defend in the Sheriff Court of South Strathclyde, Dumfries & Galloway at Airdrie, Scotland.

Nov 30 2012 Lodging approved. Twenty copies of a decision by the Constitutional Court of Spain from the Solicitor General received and distributed.

Nov 30 2012 Respondent's lodging proposals approved. Twenty copies each of documents from the Sheriff Court of South Strathclyde, Dumfries & Galloway at Airdrie, Scotland, and of the Notice of Intention to Defend in the Sheriff Court of South Strathclyde, Dumfries & Galloway at Airdrie, Scotland.

Dec 4 2012 Proposal to lodge copies of proceedings, in the Larbie v. Larbie case before the High Court of Justice Family Division, pursuant to a request of the UKCA under the Hague Convention on the Civil Aspects of International child Abduction filed.

Dec 5 2012 Argued. For petitioner: Stephen J. Cullen, Washington, D. C. For respondent: Michael E. Manely, Marietta, Ga.; and Nicole A. Saharsky, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

No. 11-1347

FILED
MAY 7 - 2012
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JEFFREY LEE CHAFIN,

Petitioner,

v.

LYNN HALES CHAFIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the International Child Abduction Remedies Act 42 U.S.C. §§ 11601-11610 (2000) and the Hague Convention on the Civil Aspects of International Child Abduction a parent may file a petition for return of their minor child/custodian to the child's country of habitual residence if it appears that the child has been wrongfully abducted. Once an Order has issued from the District Court returning the child to the petitioning custodian and an appeal has been filed by the respondent the Circuits are spilt as to whether the return of the child to the country of habitual residence renders the appeal moot. The Eleventh Circuit, in *Bekier v. Bekier*, 248 F.3d 1051 (2001), held that such an appeal is clearly moot since the relief sought by petitioner has been granted and the Court had "no authority 'to give opinions on moot questions or abstract propositions . . . which cannot affect the matter in issue in the case before [the Court]'" *Bekier* at 1054. The Court provided that no actual affirmative relief could be provided to the appellant. However, this decision and others like it has come under great scrutiny by other Circuits. Specifically the Fourth Circuit, in *Fawcett v. McRoberts*, 326 F.3d 491 (2003), has held that "[c]ompliance with a trial court's order does not moot an appeal (of a Petition for Return of Custody under the aforementioned Acts) if it remains possible to undo the effects of compliance or if the order will have a continuing impact on future action." *Fawcett* at 494. The Fourth

QUESTION PRESENTED – Continued

Circuit in *Fawcett* held that even after the return of a child in compliance with the lower court's order that "this Court can [affect the matter in issue]." *Id.* To consider the merits of an appeal and potentially reverse the lower court's decision would have a considerable effect. In contrast, the Eleventh Circuit's unfathomable position on this particular matter eliminates the basis and purpose of the appeal process.

Whether an appeal of a District Court's ruling on a Petition for Return of Children pursuant to International Child Abduction Remedies Act and the Hague Convention on the Civil Aspects of International Child Abduction becomes moot after the child at issue returns to his or her country of habitual residence, as in the Eleventh Circuit's *Bekier* case, leaving the United States Court system lacking any power or jurisdiction to affect any further issue in the matter or should the United States Courts retain power over their own appellate process, as in the Fourth Circuit's *Fawcett* case, and maintain jurisdiction throughout the appellate process giving the concerned party an opportunity for proper redress.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jeffrey Lee Chafin, petitions the Court for a Writ of Certiorari to review a final order of the United States Court of Appeals for the Eleventh Circuit (entered February 6, 2012) holding that the underlying District Court's order was to be vacated and the action moot.

OPINIONS BELOW

The opinion/order of the United States Court of Appeals for the Eleventh Circuit is not reported and is included in the Appendix. The underlying final order of the United States District Court for the Northern District of Alabama is not reported and is included in the Appendix.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 6, 2012. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. §§ 11601-11610 (2000), in pertinent part:

> To establish procedures to implement the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, and for other purposes.

The Hague Convention on the Civil Aspects of International Child Abduction, in pertinent part:

> Article 1
>
> The objects of the present Convention are –
>
> a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.
>
> Article 8
>
> Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

Article III, Section 2 of the U.S. Constitution, in pertinent part:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; – to all cases affecting ambassadors, other public ministers and consuls; – to all cases of admiralty and maritime jurisdiction; – to controversies to which the United States shall be a party; – to controversies between two or more states; – between a state and citizens of another state; – between citizens of different states; – between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

STATEMENT OF THE CASE

Petitioner is a Sgt. First Class in the United States Army. Respondent is a Scottish national. The parties were married in Germany, where Sgt. Chafin was stationed, in early 2006. The parties' daughter was born in Germany the following year. Sgt. First Class Chafin was subsequently deployed to Afghanistan for 15 months from 2007 to 2008. Ms. Chafin moved to Scotland with the child while Sgt. Chafin was deployed. When Sgt. Chafin returned to Germany from Afghanistan in 2008, the parties decided to remain separated at that time. Sgt. Chafin was

transferred to Redstone Arsenal in Huntsville, Alabama in the beginning of 2009. Ms. Chafin and the child came to Alabama to help Sgt. Chafin select a house to purchase. The child stayed several more months in Alabama with Sgt. Chafin though Ms. Chafin returned to Scotland. Ms. Chafin again returned to Alabama with the child toward the end of 2009 when the parties decided to resume cohabitation in Alabama.

The parties' relationship remained rocky which, at one point, resulted in Sgt. Chafin filing for divorce in May 2010 in the Circuit Court of Alabama. Sgt. Chafin contends he filed because Ms. Chafin threatened to take the child where Sgt. Chafin would never see her again. Ms. Chafin contends that she had planned to leave with the child on the day she was served with divorce papers, though she had not purchased any airplane tickets whatsoever. At the initial hearing for the divorce, the Alabama Circuit Court determined that the parties had resolved their immediate differences and that there was no need for a hearing. At the conclusion of this hearing, both parties retained full and complete joint legal and physical custody of the minor child.

The parties continued to live together as husband and wife, attending parties, going on vacation, raising their child, and only moved into separate bedrooms in the Autumn of 2010. As the date scheduled for the trial arrived in December 2010, Ms. Chafin hired counsel to represent her in the divorce. While she did not file an Answer or any other responsive pleading,

she did request and received a continuance from the Alabama Circuit Court's December trial calendar.

In her Petition and at trial, Ms. Chafin contended that Sgt. First Class Chafin took the child's two passports which consisted of the child's United States Passport and her Scottish Passport, and kept them from Ms. Chafin. At trial, Ms. Chafin admitted that she had access to the child's United States Passport. Ms. Chafin always retained possession of her own passport.

After the initial hearing in the divorce, Ms. Chafin worked on remodeling the house, inquired about purchasing and training a new dog for the family and began filing appropriate documents with the United States Government to obtain her permanent residency in the United States. The child remained enrolled in school and was fully engaged and immersed in her American community. Ms. Chafin admitted at trial that she had never written to anyone that she intended only to visit the United States, rather, everyone she wrote to, and everyone who testified that she spoke to them about the matter, expressed that Ms. Chafin was unequivocal that she and her child had moved to the United States of America.

Ms. Chafin was also getting into confrontations with the police. She was twice arrested in incidents arising from her extreme state of intoxication. Finally, on December 24, 2010, she was arrested on a domestic violence incident in which she threatened Sgt. First Class Chafin with a knife while she was,

again, quite drunk. Ms. Chafin admits to being inebriated that night, but disagrees that any incident took place. The charges against Ms. Chafin were eventually dropped months later when it became apparent that she would not be returning from Scotland, to which she had been deported.

As a result of Ms. Chafin's incarceration stemming from the domestic violence incident, U.S. Immigration and Customs [ICE] officials determined that she had overstayed her 90 Day Tourist Visa which had expired in August 2010. Though she had arrived in February, Ms. Chafin kept the Visa in compliance by periodically returning to Scotland, alone, for a few days, then returning home to the United States. According to Ms. Chafin when the events occurred, she ceased returning to Scotland because officials of U.S. Citizenship and Immigration Services [USCIS] advised her that under no circumstance should she leave the country or she would have to restart the immigration process. By the time of trial, Ms. Chafin blamed her husband for her not returning to Scotland to renew her tourist visa.

Ms. Chafin did not contend that the child was a Habitual Resident of Scotland or that she was not a resident of the United States until a few days after Ms. Chafin had been deported to Scotland. To the contrary, Ms. Chafin took many efforts to remain in the United States. Even while being detained for more than a month awaiting deportation, Ms. Chafin contended that the child would remain here, in the United States, where Ms. Chafin hoped she could return.

On May 2, 2011, Ms. Chafin instituted her action in United States District Court for the Northern District of Alabama for the return of the child to Scotland. This was done pursuant to The Hague Convention and International Child Abduction Act and the International Child Abduction Remedies Act. A hearing was held on this matter on October 11 and 12, 2011. Despite this evidence supported by every witness and every document (except for portions of Ms. Chafin's testimony), the lower court determined that Scotland was the child's Habitual Residence and permitted Ms. Chafin to take the child to Scotland. Within twenty minutes of the Court issuing its oral ruling from the bench, Sgt. Chafin filed his Motion requesting that the lower court stay the child's relocation to Scotland pending appeal. Within sixteen minutes the lower court denied Sgt. Chafin's Motion. (See Appendix page 13). The lower court "permitted" Ms. Chafin to leave and take the child. The timing and circumstance of Ms. Chafin's departure was of her choosing, designed to unilaterally accomplish her ends in the hope of barring the District Court from providing relief to Sgt. Chafin.

Ms. Chafin made immediate efforts to flee the country within a few hours, permitting Sgt. Chafin to have less than an hour with his daughter, who by then had lived in the United States for nineteen months and with Sgt. Chafin exclusively for almost ten months. On October 13, 2011 the Court issued its written order confirming the return of the child to Scotland. (See Appendix page 3).

Though Ms. Chafin has returned to Scotland, this time with the child, she has not undertaken any steps to initiate any custody proceedings there. Instead, the only action now and ever affecting the custody of this child has been pending in the Circuit Court of Alabama as a divorce action. Sgt. Chafin appealed the order to the Eleventh Circuit Court of Appeals. Notice of Appeal was filed on November 14, 2011. Subsequently, Ms. Chafin through counsel filed a Motion to Dismiss Appeal alleging the underlying action was moot based the child having returned to Scotland. On February 6, 2012 the Court of Appeals issued its one-page order vacating the District Court previous order and dismissing the appeal as moot thereby leaving Sgt. Chafin with no immediate legal recourse. (See Appendix page 1).

REASONS FOR GRANTING THE WRIT

The Circuits are split over whether an appeal from a ruling by the District Court of a Petition for Return of Children pursuant to The Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act (42 U.S.C. §§ 11601-11610 (2000)) is moot when the child returns to his or her country of habitual residence.

The Eleventh Circuit has relied on *Bekier v. Bekier*, 248 F.3d 1051 (2001) for the propcsition that

an appeal of the granting from a ruling by a District Court of a Petition for Return of Children pursuant to The Hague Convention on Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act is moot when the child returns to his or her country of habitual residence. In *Bekier*, the Court held that such an appeal of a district court order directing the return of a child to his father in Israel under The Hague Convention was moot when the child returned home during the pendency of the appeal. The Court did issue a stay if an appeal was filed and the mother posted a $100,000.00 bond. *Id.* at 1053. The mother filed the appeal but failed to post the bond and the child was returned to the father. The Eleventh Circuit held that the father had received the initial relief sought and the Court had "no authority 'to give opinions on moot questions or abstract propositions . . . which cannot affect the matter in issue in the case before [the Court].'" *Id.* at 1054. The Court provided that no actual affirmative relief could be provided the mother and her only hope lay in the Israeli courts. The Court by its own omission became powerless and that no "live" issue remained for which relief could be granted.

In agreement, the Sixth Circuit in *March v. Levine* granted stay of an order to return a child "recognizing that immediate return of the children to Mexico may effectively moot any appeal." 136 F. Supp. 2d 831, 861 (M.D. Tenn.), aff'd, 249 F.3d 462 (6th Cir. 2001).

In contrast to those holdings, the Fourth Circuit in *Fawcett v. McRoberts*, 326 F.3d 491 (2003) concluded that an appeal of a ruling on a Hague Convention petition was not moot even though the child had returned to the country of habitual residence (in this case: Scotland). "Compliance with a trial court's order does not moot an appeal if it remains possible to undo the effects of compliance or if the order will have a continuing impact on future action." *Id.* at 494, quoting 13A Charles Wright, et al., Federal Practice and Procedure § 3533.2 (2d ed. 1984). The Fourth Circuit in *Fawcett* held that even after the return of a child in compliance with the lower court's order that "this Court can [affect the matter in issue]." *Id.* To consider the merits of an appeal and potentially reverse the lower court's decision would have a considerable effect. While the *Bekier* Court may have felt that any order it could have issued may have been difficult to enforce with a child living outside of the United States it is "not clear that a lack of effective methods for enforcing a court order necessarily means that the court's opinion 'cannot affect the matter in issue.'" *Id.* at 496, quoting *Church of Scientology v. United States*, 506 U.S. 9, 12, 113 S.Ct. 447 (1992). For example, in a 1995 Second Circuit decision there was little hope of enforcement of a civil judgment against Radovan Karadzic, a fugitive from The Hague International War Crimes Tribunal, however, the Court did not dismiss the plaintiff's claims as moot. *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995). This further clouds the rationale of the *Bekier* court.

The Court further held that

> [t]he overwhelming majority of other courts have also evidenced their agreement with this position by routinely considering the merits of an appeal from an order returning a child to a foreign country, even when compliance with the order has resulted in the child's presence in a foreign country. See, e.g., *Ohlander v. Larson*, 14 F.3d 1531, 1538-39 (10th Cir. 2000) (rejecting mother's arguments that her petition should be dismissed because it "was moot and because [the child] was no longer in Utah" and noting that accepting such arguments "could give parents an undue incentive to flee from Hague Convention proceedings"); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999) (reviewing merits of an appeal, even after child had been returned to Greece in compliance with trial court order made pursuant to Convention and International Child Abduction Remedies Act; see also, e.g., *Rydder v. Rydder*, 49 F.3d 369 (8th Cir. 1995) (reviewing merits of appeal from district court order that child be returned to foreign country pursuant to Convention and ICARA and in which no stay appears to have been issued); *Dalmasso v. Dalmasso*, 269 Kan. 752, 9 P.3d 551 (Kan. 2000); *Sampson v. Sampson*, 267 Kan. 175, 975 P.2d 1211 (Kan. 1999); *Harkness v. Harkness*, 227 Mich. App. 581, 577 N.W.2d 116 (Mich. Ct. App. 1998).
>
> Indeed, at least two appellate courts have recently granted the precise relief [McRoberts]

> seeks, i.e., reversal of a trial court's order returning a child to a foreign country even after the child has left the United States. See *In re Marriage of Jeffers*, 992 P.2d 686, 689, 692 (Co. Ct. App. 1999) (reversing "the portion of the judgment returning the children to Greece" notwithstanding fact that children had already been returned to Greece in compliance with original order); *Bless v. Bless*, 318 N.J. Super. 90, 723 A.2d 67, 75 (N.J. Super. Ct. 1998) (reversing and remanding to trial court, concluding "that jurisdiction has not been obliterated by [the child's] court-ordered presence in Switzerland"). Obviously these courts too concluded that their decision would "affect the matter in issue."

Id. at 495.

The Fourth Circuit in *Fawcett* was unclear why the *Bekier* court came to the conclusion it did. All the cases cited by *Bekier* in support of the mootness holding involved cases with highly different fact patterns. For example, in *B&B Chemical Co., Inc. v. United States EPA*, 806 F.2d 987, 989 (11th Cir. 1986), a case holding that a challenge to the execution of a warrant to enter property was moot because the warrant had already been executed and there was no way to "un-execute" it. Further the *Bekier* Court cited *University of Texas v. Camenisch*, 451 U.S. 390, 398, 68 L. Ed. 2d 175, 101 S. Ct. 1830 (1981), where the university had complied with a court order to provide a student with a sign-language interpreter, the University appealed but the student had graduated while the appeal was pending and the services could not be

"un-provided." These Courts were faced with impossibilities which only the reversal of time could remedy.

In the instance of the return of a child from a foreign country pursuant to an appeal of a Hague Convention return order no such impossibility exists. The Court can order this and it can be simply carried out. The *Fawcett* Court held that such orders are issued routinely and are fully in the power of the district court. See, e.g., *Ohlander*, 114 F.3d at 1535; *Goldstein v. Goldstein*, 229 Ga. App. 862, 494 S.E.2d 745, 747 (Ga. Ct. App. 1998); *Hernandez v. Branciforte*, 55 Mass. App. Ct. 212, 770 N.E.2d 41, 45, 49 (Mass. Ct. App. 2002); *Roszkowski v. Roszkowska*, 274 N.J. Super. 620, 644 A.2d 1150, 1160 (N.J. Super. Ct. 1993); *In re Vernor*, 94 S.W.3d 201, 206 (Tex. Ct. App. 2002); *Johnson v. Johnson*, 26 Va. App. 135, 493 S.E.2d 668, 671 (Va. Ct. App. 1997); see also, e.g., *Horlander v. Horlander*, 579 N.E.2d 91, 97 (Ind. Ct. App. 1991) (concluding that court had jurisdiction to issue custody order even though child was in foreign country); *Ivaldi v. Ivaldi*, 147 N.J. 190, 685 A.2d 1319, 1326 (N.J. 1996); *Middleton v. Middleton*, 227 Va. 82, 314 S.E.2d 362, 367 (Va. 1984). *Id.* at 496.

Additionally, the Third Circuit in *Whiting v. Krassner* found the *Fawcett* reasoning persuasive and concluded that an appeal of a return order under the Convention was not moot even after the child's return to [her] country of habitual residence. 391 F.3d 540 (3d Cir. 2004). The Court held that since the return of the child is still being contended under The Hague Convention [in the form of an appeal of the return

order] relief can still be granted and therefore this constitutes a "live" issue for Court. *Id.* at 545.

While the Tenth Circuit has found a Hague Convention appeal to be moot, the rationale for the decision was not that the child had merely returned to the country of habitual residence, it was that the Petitioner in that matter had obtained a new order from the country of habitual residence. In fact the Tenth Circuit declined to address the precise issue of whether a mere return of the child would render the appeal moot. *Navani v. Shahani*, 496 F.3d 1121, 1131-32 (10th Cir. 2007).

It is clear that the Eleventh and Sixth Circuits have taken a direct, opposite and arguably unfounded and unreasonable position from the Third, Fourth, Eighth and perhaps the Tenth Circuits with regard to the issue of mootness of an appeal from a ruling by the District Court of a Petition for Return of Children pursuant to The Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act when the child returns to his or her country of habitual residence.

Certiorari is proper to resolve this split.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 11-15355-CC

LYNNE [sic] HALES CHAFIN,

Plaintiff-Appellee,

versus

JEFFREY LEE CHAFIN,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Alabama

(Filed Feb. 6, 2012)

BEFORE: CARNES and HULL, Circuit Judges.

BY THE COURT:

Plaintiff-Appellee Lynne [sic] Hales Chafin ("Lynne [sic]") motion for leave to dismiss Defendant-Appellant Jeffrey Lee Chafin's ("Jeffrey") appeal from the district court's October 13, 2011 order granting Lynne's [sic] petition for return of their daughter, EEC, to Scotland is GRANTED. *Pacific Ins. Co. v. Gen. Dev. Corp.*, 28 F.3d 1093, 1096 (11th Cir. 1994); *Bekier v. Bekier*, 248 F.3d 1051, 1054-56 (11th Cir. 2001). Further, the case is REMANDED with

instructions for the district court to VACATE the October 13, 2011 order and DISMISS the case as moot. *See Bekier*, 248 F.3d at 1056.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ALABAMA
NORTHEASTERN DIVISION

LYNN HALES CHAFIN,

Plaintiff,

vs.

JEFFREY LEE CHAFIN,

Defendants [sic].

CASE NO.
CV-11-J-1461-NE

ORDER

(Filed Oct. 13, 2011)

This case came on to be heard on the petitioner's verified petition for return of child to Scotland (doc. 1) and the respondent's answer thereto (doc. 14). Petitioner was present in person and through counsel, and respondent was present in person and through counsel, and the court heard testimony and arguments and received exhibits into evidence. Having considered the foregoing, the court makes the following findings of fact and conclusions of law:

When a child who was habitually residing in one signatory state is wrongfully removed to, or retained in, another, Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction ("Convention") provides that the latter state "shall order the return of the child forthwith." *Id.*, art. 12, 19 I.L.M. 1501, 1502. Further, Article 16 provides that "until it has been determined that the child is not to

be returned under this Convention," the judicial or administrative authorities of a signatory state "shall not decide on the merits of rights of custody." Convention, art. 16, 19 I.L.M. at 1503. The United States and the United Kingdom are both signatories to the Convention. See *Hague Conference of Private International Law: Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction,* 33 I.L.M. 225, 225 (1994); and the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601 *et. seq.*

To establish wrongful removal or retention of a child under the Convention, the petitioner must show by a preponderance of the evidence that (1) the child was a habitual resident of Scotland immediately before retention in the United States, (2) the retention was in breach of petitioner's custody rights under Scottish law, and (3) petitioner had been exercising her custody rights at the time of retention. *Convention,* art. 3; *Ruiz v. Tenorio,* 392 F.3d 1247, 1251 (11th Cir.2004). If Petitioner meets this burden, the child must be "promptly returned unless one of the narrow exceptions set forth in the Convention applies." *Lops v. Lops,* 140 F.3d 927, 936 (11th Cir.1998). The court's inquiry is limited to the merits of the abduction claim and not the merits of the underlying custody battle. 42 U.S.C. § 11601(b)(4).

Thus, the court considered where the child's habitual residency was at the times relevant to the pending petition. The Ninth Circuit has helpfully set

forth the following four questions: "(1) When did the removal or retention at issue take place? (2) Immediately prior to the removal or retention, in which state was the child habitually resident? (3) Did the removal or retention breach the rights of custody attributed to the petitioner under the law of the habitual residence? (4) Was the petitioner exercising those rights at the time of the removal or retention?" *Mozes v. Mozes,* 239 F.3d 1067, 1070 (9th Cir. 2001).[1]

Habitual Residency:

The petitioner asserted, and the respondent agreed, that the child at issue here had her habitual residence in Scotland until February 14, 2010.[2] The petitioner testified that on that date she and the child traveled to the United States in hopes of salvaging her marriage to the respondent.[3] The respondent argues this was done with the intent to abandon

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[1] The Eleventh Circuit Court of Appeals has stated that the opinion in *Mozes* "is not only the most comprehensive discussion of the issue, but also sets out the most appropriate approach." *Ruiz v. Tenorio,* 392 F.3d 1247, 1252 (11th Cir.2004).

[2] Neither party disputed that the petitioner and respondent, until February 2010, intended the child's habitual residence to be in Scotland. The dispute as to her habitual residence only arose after that date, as further explained herein.

[3] Because a young child . . . does not have a 'settled intent' independent of his or her parents, a court should look to 'the settled purpose and shared intent of the child's parents in choosing a particular habitual residence.'" *Whiting v. Krassner,* 391 F.3d 540, 550 (3d Cir.2004); *see also Ruiz,* 392 F.3d at 1253.

Scotland as the habitual residence in favor of the United States. To determine an intended habitual residence, the court must look to the shared intentions of both parents rather than unilateral intentions of one parent. *See e.g., Feder v. Evans-Feder,* 63 F.3d 217, 224 (3rd Cir.1995).

"Because the Convention tries to prevent one parent from unilaterally determining the country in which the child will live, the habitual residence of the child cannot be shifted without mutual agreement." *In re Ahumada Cabrera,* 323 F.Supp.2d 1303, 1311 (S.D.Fla.2004) (citing *Mozes,* 239 F.3d at 1077). "The first step toward acquiring a new habitual residence is forming a settled intention to abandon the one left behind." *Ruiz,* 392 F.3d at 1252 (citing *Mozes,* 239 F.3d at 1075). Although the respondent asserted this was the purpose in the petitioner's traveling here in February 2010, the evidence adduced at trial did not support this claim. Uncontroverted evidence and testimony established that the petitioner decided to return to Scotland with the child in early May, 2010, that but for the respondent serving the petitioner with a petition for divorce and an emergency custody restraining order, the petitioner would have left the United States with the child in May 2010, and that the respondent took actions to prevent the child from leaving the United States beginning in May 2010 and continuing thereafter. The court has found no shared intention between the petitioner and respondent to abandon Scotland as the child's habitual residence. Like the facts before the court in *Ruiz v. Tenorio*, at

most the petitioner and child came here for a trial period, which did not work out. *Id.*, 392 F.3d 1247, 1254 (11th Cir.2004). *See also Sewald v. Reisinger*, 2009 WL 150856, at 2 (M.D.Fla.2009) (discussing factual issue of shared settled intent concerning residence of the child).

The evidence before the court was further undisputed that the petitioner never intended to permit the child to reside in the United States while she returned to or remained in Scotland.[4] The petitioner testified that when she and the child came to the United States in February, 2010, she was traveling on a 90 day visitor's visa, and that she was required to have a pre-purchased return ticket to Scotland in order to obtain such a visa. This evidence was uncontradicted. She further maintained her residence in Scotland, a rental home, at that time.

Further reflecting a lack of intent to allow the child to remain in the United States was petitioner's undisputed testimony that she believed the respondent would be transferred to Germany in September 2010. Similarly, the evidence was not disputed that the petitioner had secured a place for the child within the Scottish educational system and the child was scheduled to begin the same in April 2010. There was

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[4] Indeed, while the court does not lay out the details of the respondent's testimony in detail here, the respondent's proof focused on the actions of the petitioner as evidence of whether the petitioner ever intended to change the habitual residence of the child.

no evidence that said enrollment was ever cancelled by the petitioner.

In a final attempt to salvage their marriage, the petitioner and respondent took a trip together in April 2010, which both parties' agreed was a disaster. The petitioner testified at that time she and the respondent agreed to work out a split so she and the child could return to Scotland. However, as stated above, before the petitioner could return to Scotland with the child, the respondent served petitioner with an emergency custody petition and removed the child's passports[5] from their customary location. After the court hearing on May 19, 2010, the respondent again agreed the petitioner could return to Scotland with the child, but again would not return the child's United Kingdom passport.[6] For that reason, the petitioner continued to live with the respondent, although they both testified their marriage was over, the respondent had served the petitioner with a complaint for divorce, and they occupied separate bedrooms from at least sometime in the fall of 2010 until the petitioner's deportation proceedings began in December 2010.[7]

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[5] The child in question has dual citizenship with the United States and the United Kingdom, and hence has two passports.

[6] The respondent's testimony regarding the petitioner's access to this passport was not credible.

[7] The evidence was undisputed that but for the petitioner's deportation, she would have never left the child here. Each time the child had visited the United States previously, such visit was

(Continued on following page)

In consideration of the above evidence, the court can find no agreement between the parties to change the child's habitual residence from the United Kingdom to the United States. Furthermore, as stated above, the court finds that prior to February 2010, and continuing at least through May 2010 when she was in essence prohibited from leaving the country with the child, the petitioner was exercising her custody rights.

The court further finds that the child was wrongfully retained in the United States as of May 15, 2010, when the respondent removed the child's passport's from their location, hence removing petitioner's access to the same. That retention continued after May 19, 2010, when the uncontradicted testimony was that the respondent represented to an Alabama State judge that he would return the passports, was told to return the passports by that judge, and failed to do so. Therefore, the court finds that neither petitioner's nor the child's presence in the United States after that date was with the intent of changing the child's residence. Habitual residence is not established when the removing spouse is coerced involuntarily to remain in another country. *See e.g., Tsarbopoulos v. Tsarbopoulos,* 176 F.Supp.2d 1045, 1055 (E.D.Wash.2001). Similarly, although respondent repeatedly offered evidence for purposes of

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either accompanied by the petitioner, or with the petitioner's clear intent, ability, and actions to reclaim the child and return to Scotland after each such visit.

establishing that the child was acclimated here, such testimony is irrelevant to the issue before the court. A removing parent "must not be allowed to abduct a child and then – when brought to court – complain that the child has grown used to the surroundings to which they were abducted." *Friedich* [sic] *v. Friedich* [sic] (*Friedrich II*), 78 F.3d 1060, 1068 (6th Cir.1996).

Grave Risk:

Pursuant to Article 13b of the Convention, the court may decline to return a child wrongfully removed from his habitual residence if it is established by clear and convincing evidence that the return would present a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. *Baran v. Beaty,* 526 F.3d 1340, 1345 (11th Cir.2008). The "grave risk of physical or psychological harm" defense is an affirmative defense under Article 13(b) of the Convention that must be proved with clear and convincing evidence. 42 U.S.C. § 11603(e)(2)(A).

The respondent argues that the child's return to Scotland would expose her a grave risk of physical or psychological harm. However, at most the respondent established that while in the United States in 2010, the petitioner would consume one to two bottles of wine per week, which the petitioner testified she no longer does. Additionally, on occasions, the petitioner consumed too much alcohol, leading to one arrest for disorderly conduct. However, respondent presented

no evidence that petitioner is currently engaging in behavior which is harmful to herself or that she has ever harmed her child[8]. Absent specific evidence of severe child abuse or neglect, which respondent has not presented, the grave risk of harm defense fails.[9] *Sewald,* 2009 WL 150856 at 34 citing *Lopez v. Alcala,* 547 F.Supp.2d 1255, 1260 (M.D.Fla.2008); *Jaet v. Siso,* No. 08-81232-CIV, 2009 WL 35270, at *7 (S.D.Fla. Jan.5, 2009).

Accordingly, respondent has failed to establish by clear and convincing evidence that return of the child to Scotland would expose her to grave risk of harm. In fact, the sole evidence presented by the respondent concerning the plaintiff's harmful tendencies while drinking in the presence of the child involved claims that the petitioner hit the respondent on two occasions, one in 2009 being a slap on the back and the

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[8] The petitioner was arrested for domestic violence on either December 23 or December 24, 2010. While the court does not specifically find that the respondent manufactured the entire event he reported to 911 and to which he testified before the undersigned, the court does note that respondent's version of those events ranged from a point of questionable veracity to complete incredulity, as stated by the court on the record on October 12, 2011. The charges were later dismissed with prejudice upon motion of the prosecution.

[9] Other cases have found that sending a child to a "zone of war, famine or disease" also constitute grave danger. *See e.g., Silverman v. Silverman,* 338 F.3d 886 (8th Cir.2003). There is no allegation such conditions exist in the United Kingdom at the present time

other in 2008 being of questionable intention.[10] There absolutely was no evidence that the petitioner has ever taken any action which could present a risk to the child, grave or otherwise.

For the reasons set forth above and as stated on the record and in open court by the undersigned on October 12, 2011; it hereby **ORDERED, ADJUDGED** and **DECREED** that the verified petition for return of child to Scotland is **GRANTED**. Petitioner may return with the child to Scotland for appropriate custody proceedings to commence there.

It is further **ORDERED** by the court that the petitioner may file a separate motion for fees and costs in accordance Rule 54(d), Fed.R.Civ.P. The Clerk is directed to close this case.

DONE and **ORDERED** this the 13th day of October, 2011.

/s/ Inge Prytz Johnson
INGE PRYTZ JOHNSON
U.S. DISTRICT JUDGE

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[10] The respondent testified that on this occasion the petitioner had been drinking and was lying in bed with the child, when the petitioner's foot caught the respondent's head. No evidence or testimony that this was anything more than an accident was put before the court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

LYNN HALES CHAFIN,

Petitioner,

vs.

Case Number:
CV 11-J-1461-NE

JEFFREY LEE CHAFIN,

Respondent.

ORDER

(Filed Oct. 12, 2011)

A trial was held on plaintiff's petition and defendant's answer on October 11 and October 12, 2011. At the end of the trial, the court granted the plaintiff's petition to return the parties' minor child to Scotland with plaintiff. The court informed the parties that a separate written order setting forth the court's findings would be issued at a later date. Defendant filed a motion to stay implementation of the Order October 12, 2011 (doc. no. 29) which the court has considered. Said motion to stay is DENIED. The petitioner is permitted to return to Scotland this day with her minor child in accordance with this court's Order.

DONE and ORDERED this 12th day of October, 2011

/s/ Inge Prytz Johnson
Inge Prytz Johnson
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ALABAMA
NORTHEASTERN DIVISION

LYNN HALES CHAFIN,

Petitioner,

vs.

JEFFREY LEE CHAFIN,

Respondent.

CASE NO.
CV-11-J-1461-NE

ORDER

(Filed March 7, 2012)

The Eleventh Circuit Court of Appeals having returned jurisdiction to this court with instructions to vacate this court's Order of October 13, 2011, and dismiss this action as moot;

It is therefore **ORDERED** that this court's Order of October 13, 2011, is **VACATED**. This case is **DISMISSED** as **MOOT**.

DONE and **ORDERED** this the 7th day of March, 2012.

/s/ Inge Prytz Johnson
INGE PRYTZ JOHNSON
U.S. DISTRICT JUDGE

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
JUN 08 2012
OFFICE OF THE CLERK

No. 11-1347

RECAP
ARD
BRIEFS

In The
Supreme Court of the United States

JEFFREY LEE CHAFIN,

Petitioner,

v.

LYNNE HALES CHAFIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED

Whether an appeal of a trial court's Hague Convention return order is moot upon the child's exit from the United States and return to her country of habitual residence.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the Constitutional and Statutory Provisions provided in the Petitioner's Petition for Writ of Certiorari, the provision stated below is also relevant to this case.

Article 12, The 1980 Hague Convention on the Civil Aspects of International Child Abduction

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

STATEMENT OF THE CASE

This case is the appeal by Petitioner, Jeffrey Lee Chafin (the "Father"), from the United States District Court for the Northern District of Alabama's Order granting the Verified Petition for Return of Child to Scotland (the "Petition") filed by the Mother. The Mother's Petition was filed pursuant to The Convention on the Civil Aspects of International Child Abduction, done at the Hague on October 25, 1980 (the

"Hague Convention").[1] The child, E.E.C., born in 2007 ("the child"), returned home to Scotland on October 12, 2011 pursuant to the district court's Order, will remain in Scotland and has not left Scotland since her return home.

The Respondent, Lynne Hales Chafin (the "Mother") respectfully submits this Brief in Opposition to Petition for Writ of Certiorari to correct misstatements of fact contained in the Petition and to explain her position with respect to mootness in the context of the appeal of a Hague Convention matter. The Mother does not oppose a Writ of Certiorari being granted in this case. The Father correctly stated in his Petition for Writ of Certiorari that the circuits are split on the issue of whether an appeal of a Hague Convention return order is moot upon the child's exit from the United States. In the Mother's submission, the Eleventh Circuit's position that an appeal is moot upon a child's exit from the United States is correct and there is a clear and straightforward remedy – staying a return order pending an appeal in appropriate cases – to address any concern related to preserving a party's appellate rights after the issuance of a return order.

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[1] T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10,493 (1986); text at: http://www.hcch.net/index_en.php?act=conventions.pdf&cid=24 (last accessed June 7, 2012).

FACTS RELEVANT TO THE QUESTION PRESENTED

Only certain limited facts are relevant to this appeal on the issue of mootness. The Mother sets forth those limited relevant facts below and also addresses certain misstatements of fact contained in the Father's Petition for Writ of Certiorari.

On May 2, 2011, the Mother instituted her action in the United States District Court for the Northern District of Alabama to secure the return of her daughter to Scotland pursuant to the Hague Convention and the International Child Abduction Remedies Act (hereinafter "ICARA"),[2] after the child had been wrongfully retained in the United States by the Father.

The Mother requested that the district court rule that the Father had wrongfully retained the parties' daughter in the Northern District of Alabama and that it should order the child's return to Scotland with the Mother forthwith. A two-day evidentiary hearing was held on the Mother's Petition on October 11 and 12, 2011. At the conclusion of the trial, the district court immediately issued an oral opinion and order from the bench holding that the Father had indeed wrongfully retained the child in the United States and ordering the child to be returned to Scotland with the Mother forthwith.

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[2] 42 U.S.C. § 11601 *et seq.* (2001).

Within minutes after the lower court had issued its oral opinion and order from the bench, and had adjourned the proceedings, and the Petitioner and her counsel had left the courtroom, the Father's counsel handed the Mother's counsel a Motion to Stay Implementation of Order. The Mother's counsel therefore returned immediately to the lower court to bring the Motion to Stay to the Court's attention and to seek direction with respect to responding to the Motion to Stay and whether the Mother and child were still permitted to return to Scotland while the Motion to Stay was pending. The Father's counsel was still present in the courthouse when the Mother's counsel returned seeking direction from the lower court.

The Motion to Stay had not yet even been filed with the Clerk of the Court and therefore at the Court's instruction the Father's counsel was sent to file the Motion to Stay in the Clerk's Office. The lower court then considered the Motion to Stay in chambers and issued a written Order denying the Motion to Stay and further ordering that "[t]he petitioner is permitted to return to Scotland this day with her minor child in accordance with this court's Order."

In his Petition for Writ of Certiorari to this Court, the Father wrongly states that the Mother "made immediate efforts to flee the country within a few hours" of the district court's ruling. (Pet. at 8). The Mother did not "flee" the United States. Rather, with a copy of the district court's October 12, 2011 Order in hand, the Mother and child immediately

returned home to Scotland as ordered by the district court.

On October 13, 2011, the lower court issued a ten (10) page written Order, making its findings of fact and conclusions of law.

The Mother and child are now home in Scotland, will remain in Scotland and have not left Scotland since their return home. The Father also incorrectly states in his Petition for Writ of Certiorari to this Court that the Mother "has not undertaken any steps" to initiate custody proceedings in Scotland. The Mother has, in fact, initiated custody proceedings in Scotland and has obtained interim custody orders from the Scottish court. The custody proceedings are pending in the Scottish court and the Father was provided notice of the Scottish case.

On October 25, 2011, the Father filed a Motion to Alter or Amend Order. The Court issued an Order denying the Respondent's Motion to Alter or Amend Order the next day. On November 14, 2011, the Father filed his Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit. The Mother filed a Motion to Dismiss the Father's appeal as moot because the child had already returned to Scotland.

On February 6, 2012, the Court of Appeals entered an order vacating the district court's order and dismissing the Father's appeal as moot.

ARGUMENT

"A case is moot if no case or controversy exists for [the appellate court] to resolve: 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Bekier v. Bekier*, 248 F.3d 1051, 1054 (11th Cir. 2001) (quoting *Reich v. Occupational Safety and Health Review Comm.*, 102 F.3d 1200, 1201 (11th Cir. 1997) (internal quotations omitted). An appellate court has "no authority 'to give opinions on moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before [the Court].'" *Bekier*, 248 F.3d at 1054 (quoting *Church of Scientology v. U.S.*, 506 U.S. 9 (1992). "If an event occurs during the pendency of an appeal 'that makes it impossible for this court to grant any effectual relief whatever to a prevailing party, the appeal must be dismissed.'" *Id.*

In the *Bekier* case, the Court of Appeals for the Eleventh Circuit analyzed the concept of mootness in the context of a Hague Convention case where the child at issue had returned to his habitual residence of Israel with the father. The Eleventh Court held that a child's return to its habitual residence from the United States pursuant to a district court order during the pendency of an appeal of the district court order renders the appeal moot. *Bekier*, 248 F.3d at 1054.

The material facts in this case are akin to the facts in *Bekier*. In *Bekier*, the child at issue had been wrongfully removed from Israel and was being wrongfully retained in the United States by the child's mother. *Id.* at 1053. The father filed a petition in the Southern District of Florida seeking the child's return to his habitual residence of Israel pursuant to the Hague Convention. *Id.* The district court ordered that the child be returned to the father and returned to the child's habitual residence of Israel. *Id.* The mother filed a motion to stay the district court's order. *Id.* The district court issued a conditional stay ordering the child's return to Israel be stayed, but only if the mother filed an appeal within ten days and posted a $100,000.00 bond. *Id.* The mother filed her appeal within ten days but failed to post the required bond. *Id.* The stay therefore expired by its own terms and the father returned to Israel with the child pursuant to the district court's order. *Id.*

When *Bekier* came before the Eleventh Circuit on appeal, the Court held that the child's exit from the United States and return to his habitual residence of Israel pursuant to the district court's order "raised the question of whether [the] case is moot." *Id.* at 1054. The Eleventh Circuit concluded that the child's exit from the United States and return to his habitual residence rendered the case moot. *Id.*

The Eleventh Circuit explained that although the mother had appealed the district court's decision, "what relief we can offer her or what 'legally cognizable interest [she has] in the outcome [of this appeal]'

is not clear." *Bekier*, 248 F.3d at 1054 (quoting *Wakefield v. Church of Scientology of Cal.*, 938 F.2d 1226, 1229 (11th Cir. 1991)). The Eleventh Circuit further explained that a reversal of the district court's order would "provide Ms. Bekier with no actual affirmative relief. [The child] has already returned to Israel. Ms. Bekier's potential remedies now lie in the Israeli courts. Any words by us would be merely advisory." *Bekier*, 248 F.3d at 1054 (internal citations omitted).

The Eleventh Circuit explained that although a party "need not necessarily seek a stay of a lower court's judgment to perfect an appeal, 'the consequence of failing to obtain a stay is that the prevailing party may treat the judgment of the district court as final.'" *Bekier*, 248 F.3d at 1054 (quoting *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.3d 1294, 1295 (11th Cir. 1984)). The Eleventh Circuit continued: "[w]hen [the child] returned to Israel with his father, we became powerless to grant the relief requested by Ms. Bekier. And so we *must* dismiss this appeal." *Bekier*, 248 F.3d at 1055 (emphasis added).

Ms. Bekier argued to the Eleventh Circuit that dismissal of her appeal would defeat the spirit and intention of the Hague Convention. *Id.* The Court considered her position, but determined that "the United States Courts are restricted by the jurisdictional doctrine of mootness. Given our duty to respect the limits of our judicial authority, we will not create a 'live' case or controversy in an effort to promote the spirit of the Convention." *Id.* (citing *Walsh v. Walsh*,

221 F.3d 204, 214 (1st Cir. 2000) ("Neither the Convention nor the U.S. implementing legislation restricts the appellate process")).

The Eleventh Circuit concluded in *Bekier* that "[w]here a case becomes moot after the district court enters judgment but before the appellate court has issued a decision, the appellate court must dismiss the appeal, vacate the district court's judgment and remand with instructions to dismiss as moot." *Bekier*, 248 F.2d at 1055-6. The child's return to Israel therefore rendered the *Bekier* appeal moot and the appeal was dismissed. *Id.* at 1056.

A majority of the United States federal circuits that have opined on the issue of mootness in the context of a Hague Convention case, where the child at issue has exited the United States during the pendency of an appeal of a district court's order, have agreed with the Eleventh Circuit, holding that the appeal in such circumstances is rendered moot. *See, e.g.*, *Walsh v. Walsh*, 221 F.3d 204, 214 (1st Cir. 2000); *Nicholson v. Pappalardo*, 605 F.3d 100, 106-7 (1st Cir. 2010); *March v. Levine*, 249 F.3d 462, 468 (6th Cir. 2001).

The Father argues in his Petition for Writ of Certiorari that an appeal of a Hague Convention return order should not be considered moot upon a child's exit from the United States. This Court has clearly articulated, however, that an appellate court has "no authority 'to give opinions on moot questions or abstract propositions, or to declare principles or

rules of law which cannot affect the matter in issue in the case before [the Court].'" *Bekier*, 248 F.3d at 1054 (quoting *Church of Scientology v. U.S.*, 506 U.S. 9 (1992). A court in the United States would be declaring a principle or rule of law which cannot affect the matter in issue if it were to rule on an appeal where the child has already been returned to another country from the United States. An appeal of a Hague Convention return order where a child has already departed the United States therefore must be considered moot.

Any concern with respect to preserving a party's appellate rights can be addressed by the issuance of a stay of the return order in appropriate cases where the party seeking the stay meet the requirements set forth by this court for the issuance of a stay. *See Hilton v. Braunskill,* 107 S.Ct. 2113, 2120 (1987); *see also Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986); *Ruiz v. Estelle,* 650 F.2d 555, 565 (5th Cir. 1981).

CONCLUSION

For the foregoing reasons, Ms. Chafin does not oppose a Writ of Certiorari being granted in this matter.

Respectfully submitted,

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June 8, 2012

JOINT APPENDIX

Supreme Court, U.S.
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No. 11-1347

In the Supreme Court of the United States

JEFFREY LEE CHAFIN,
Petitioner,

v.

LYNNE HALES CHAFIN,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

JOINT APPENDIX

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September 26, 2012

Petition for Writ of Certiorari filed May 7, 2012
Petition for Writ of Certiorari granted August 13, 2012

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RELEVANT DOCKET ENTRIES

United States District Court for the
Northern District of Alabama (Northeastern)

No. 5:11-cv-01461-IPJ

Chafin v. Chafin

Date Filed	**#**	**Docket Text**
05/02/2011	1	COMPLAINT against Jeffrey Lee Chafin (Filing fee $ 350, receipt #H4601000832.), filed by Lynne Hales Chafin.(ASL) (Additional attachment(s) added on 5/13/2011: # 1 Exhibit A, # 3 Exhibit C, # 4 Exhibit D) (ASL,). (Additional attachment(s) added on 5/13/2011: # 5 Exhibit B - part 1, # 6 Exhibit B part 2, # 7 Errata B part 3) (ASL,). Modified on 5/13/2011 (ASL). (Entered: 05/06/2011)
05/02/2011	2	MOTION for admission pro hac vice for Stephen J. Cullen by Lynne Hales Chafin. (ASL) Modified on 5/9/2011 (ASL). (Entered: 05/06/2011)
05/02/2011		PHV Fee paid: $50, receipt number H4601000834 for atty

		Cullen (ASL) (Entered: 05/06/2011)
05/02/2011	3	MOTION for admission pro hac vice for Kelly A. Powers by Lynne Hales Chafin. (ASL) (Entered: 05/06/2011)
05/02/2011		PHV Fee paid: $50, receipt number H4601000833 for atty Powers (ASL) (Entered: 05/06/2011)
05/02/2011	4	MOTION for expedited consideration of verified petition for return of child to Scotland and issuance of show cause order by Lynne Hales Chafin. (ASL) (Entered: 05/06/2011)
05/09/2011	5	ORDER that court WITHHOLDS ruling on relief sought until such time as this petition has been served on dft and dft has filed an answer. Signed by Judge Inge P Johnson on 5/9/11. (ASL) (Entered: 05/09/2011)
05/10/2011	6	Summons Issued as to Jeffrey Lee Chafin; del to pla for service (ASL) (Entered: 05/13/2011)

05/13/2011	7	SUMMONS Returned Executed by Lynne Hales Chafin. (Kelley, Walter) (Entered: 05/13/2011)
06/01/2011	8	MOTION to dismiss and/or for order of transfer by Jeffrey Lee Chafin. (ASL) (Entered: 06/02/2011)
06/03/2011	9	ORDER re 8 MOTION to Dismiss filed by Jeffrey Lee Chafin; pla is ORDERED to respond to said motion w/i 10 days. Signed by Judge Inge P Johnson on 6/3/11. (ASL) (Entered: 06/03/2011)
06/13/2011	10	RESPONSE in Opposition re 8 MOTION to Dismiss filed by Lynne Hales Chafin. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Powers, Kelly) (Entered: 06/13/2011)
06/14/2011	11	ORDER denying 8 Motion to Dismiss. Signed by Judge Inge P Johnson on 6/14/11. (ASL) (Entered: 06/14/2011)
06/14/2011	12	ORDER granting 3 Motion for admission pro hac vice of Kelly A. Powers; granting 2 Motion for admission pro hac vice of Stephen J. Cullen. Signed by

		Judge Inge P Johnson on 6/14/11. (ASL) (Entered: 06/14/2011)
06/14/2011	13	ORDER Setting Hearing on Motion 4 MOTION for expedited consideration of verified petition for return of child to Scotland and issuance of show cause order: Motion Hearing set for 8/4/2011 09:00 AM in Hugo L Black US Courthouse, Birmingham, AL before Judge Inge P Johnson. Signed by Judge Inge P Johnson on 6/14/11. (ASL) (Entered: 06/14/2011)
07/06/2011	14	ANSWER to Complaint by Jeffrey Lee Chafin.(Presto, Robert) (Entered: 07/06/2011)
08/03/2011	15	First MOTION for Leave to Appear Pro Hac Vice by Jeffrey Lee Chafin. (Manely, Michael) (Entered: 08/03/2011)
08/03/2011		PHV Fee paid: $ 50, receipt number 1126-1452031. (Manely, Michael) Modified on 8/3/2011 receipt #B4601025473 (ASL). (Entered: 08/03/2011)
08/03/2011	16	Second MOTION for Leave to Appear Amended Motion Pro Hac Vice by Jeffrey Lee Chafin.

		(Manely, Michael) (Entered: 08/03/2011)
08/04/2011	17	ORDER finding as moot 15 Motion for admission pro hac vice; granting 16 Motion for admission pro hac vice Michael E. Manely. Signed by Judge Inge P Johnson on 8/4/11. (ASL) (Entered: 08/04/2011)
08/04/2011	18	ORDER granting 4 MOTION to Expedite filed by Lynne Hales Chafin. Trial set for 10/11/2011 09:00 AM in Federal Courthouse, Huntsville, AL before Judge Inge P Johnson. Signed by Judge Inge P Johnson on 8/4/11. (ASL) (Entered: 08/04/2011)
08/04/2011	19	ORDER by agreement of the parties, the dates and proceedings in order to expedite the trial of this matter are as set out in this order; parties further agreed and it is ORDERED that the passports of the child shall be surrendered to the custody of the undersigned w/i 7 days of today's date; child shall be present in this court's jurisdiction for visitation with the pla as of 10/7/11; parties further agreed to attempt

		mediation through the Hague Pilot Mediation Program and are hereby ORDERED to do so as soon as practicable. Signed by Judge Inge P Johnson on 8/4/11. (ASL) (Entered: 08/04/2011)
08/19/2011	20	REQUEST for Production of Documents by Jeffrey Lee Chafin.(Manely, Michael) (Entered: 08/19/2011)
08/19/2011	21	INTERROGATORIES Propounded to Lynne Chafin by Jeffrey Lee Chafin.(Manely, Michael) (Entered: 08/19/2011)
08/19/2011	22	CERTIFICATE OF SERVICE by Jeffrey Lee Chafin re 21 Interrogatories Propounded, 20 Request for Production of Documents (Manely, Michael) (Entered: 08/19/2011)
09/19/2011	23	ANSWER to Interrogatories from Respondent by Jeffrey Lee Chafin.(Manely, Michael) (Entered: 09/19/2011)
09/19/2011	24	RESPONSE to Discovery Request from Jeffrey Lee Chafin by Jeffrey Lee Chafin.(Manely, Michael) (Entered: 09/19/2011)

09/19/2011	25	CERTIFICATE OF SERVICE by Jeffrey Lee Chafin re 23 Answer to Interrogatories, 24 Response to Discovery (Manely, Michael) (Entered: 09/19/2011)
10/05/2011	26	ANSWER to Interrogatories from Jeff Chafin by Jeffrey Lee Chafin.(Manely, Michael) (Entered: 10/05/2011)
10/05/2011	27	RESPONSE to Discovery Request from Jeff Chafin by Jeffrey Lee Chafin.(Manely, Michael) (Entered: 10/05/2011)
10/05/2011	28	CERTIFICATE OF SERVICE by Jeffrey Lee Chafin re 27 Response to Discovery, 26 Answer to Interrogatories (Manely, Michael) (Entered: 10/05/2011)
10/11/2011		Minute Entry for proceedings held before Judge Inge P Johnson: Bench Trial held on 10/11/2011; Opening stmts; Testimony: Plaintiff rest: trial to continue 10/12/2011;ct adj. (Court Reporter Cheryle Powell.) (TLM,) (Entered: 10/13/2011)
10/12/2011	29	MOTION to Stay Implementation of Order by

		Jeffrey Lee Chafin. (AHI) (Entered: 10/12/2011)
10/12/2011	30	ORDER denying 29 Motion to Stay Implementation of Order entered by undersigned on 10/12/11; the petitioner is permitted to return to Scotland this day with her minor child in accordance with Court's order. Signed by Judge Inge P Johnson on 10/12/11. (SHB,) (Entered: 10/12/2011)
10/12/2011		Minute Entry for proceedings held before Judge Inge P Johnson: Bench Trial ; Testimony; deft rests; Order (oral)entered by court; Written order to be entered; Motion by dft to stay order; Denied; ct adj completed on 10/12/2011. (Court Reporter Cheryle Powell.) (TLM,) (Entered: 10/13/2011)
10/13/2011	31	ORDER that verified petition for return of child to Scotland is GRANTED, petitioner may return with the child to Scotland for appropriate custody proceedings to commence there; further ORDERED that petitioner may file a separate motion for fees and costs in

		accord w/Rule 54(d), FRCP; Clerk is directed to close this case. Signed by Judge Inge P Johnson on 10/13/11. (ASL) Modified on 3/7/2012 - VACATED - see order doc # 51 (ASL). (Entered: 10/13/2011)
10/25/2011	32	Transcript of Bench Trial (VOLUME I) held on October 11, 2011, before Judge Inge P. Johnson. Court Reporter/ Transcriber Cheryl K. Powell. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. NOTICE: The parties have seven (7) calendar days to file with the Court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely electronically available to the public without redaction after 90 calendar days. (A copy can be obtained at http://www.alnd.uscourts.gov/local/courtforms/transcripts/ Transcript Redaction Policy.pdf) See Transcript

		Redaction Policy Redaction Request due 11/15/2011. Redacted Transcript Deadline set for 11/25/2011. Release of Transcript Restriction set for 1/23/2012. (ASL) (Entered: 10/25/2011)
10/25/2011	33	Transcript of Bench Trial (VOLUME II) held on October 12, 12011, before Judge Inge P. Johnson. Court Reporter/ Transcriber Cheryl K. Powell. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. NOTICE: The parties have seven (7) calendar days to file with the Court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely electronically available to the public without redaction after 90 calendar days. (A copy can be obtained at http://www.alnd.uscourts.gov/local/courtforms/transcripts/ Transcript Redaction Policy.pdf) See Transcript

		Redaction Policy Redaction Request due 11/15/2011. Redacted Transcript Deadline set for 11/25/2011. Release of Transcript Restriction set for 1/23/2012. (ASL) (Entered: 10/25/2011)
10/25/2011	34	MOTION to Alter Judgment by Jeffrey Lee Chafin. (Presto, Robert) (Entered: 10/25/2011)
10/26/2011	35	ORDER denying 34 motion to alter or amend order. Signed by Judge Inge P Johnson on 8/26/11. (ASL) (Entered: 10/26/2011)
10/26/2011	36	MOTION for Attorney Fees *and Necessary Expenses* by Lynne Hales Chafin. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I)(Powers, Kelly) (Entered: 10/26/2011)
10/27/2011	37	ORDER re 36 MOTION for Attorney Fees *and Necessary Expenses* filed by Lynne Hales Chafin; respondent is ORDERED to respond to said motion w/i 14 days. Signed by

		Judge Inge P Johnson on 8/27/11. (ASL) (Entered: 10/27/2011)
11/10/2011	38	REPLY Brief filed by Defendant Jeffrey Lee Chafin re: 36 MOTION for Attorney Fees *and Necessary Expenses* filed by Jeffrey Lee Chafin. (Attachments: # 1 Exhibit) (Manely, Michael) (Entered: 11/10/2011)
11/14/2011	39	NOTICE OF APPEAL by Jeffrey Lee Chafin. Filing fee $ 455, receipt number 1126-1521862. (Manely, Michael) Modified on 11/16/2011 NDAL receipt #B4601028414 (ASL). (Entered: 11/14/2011)
11/14/2011		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 39 Notice of Appeal (ASL) (Entered: 11/14/2011)
11/17/2011	40	USCA Case Number 11-15355CC for 39 Notice of Appeal filed by Jeffrey Lee Chafin. (ASL) (Entered: 11/17/2011)
11/22/2011	41	REPLY Brief filed by Plaintiff Lynne Hales Chafin re: 38 Reply Brief *Request for Leave to File a Reply with Proposed Reply*

		Attached as Exhibit A filed by Lynne Hales Chafin. (Attachments: # 1 Exhibit A)(Powers, Kelly) (Entered: 11/22/2011)
11/22/2011		MOTION for Leave to File Brief by Lynne Hales Chafin. (see doc 41) (BST) (Entered: 11/22/2011)
11/22/2011	42	ORDER granting [] Motion for Leave to File. Signed by Judge Inge P Johnson on 11/22/2011. (KAM,) (Entered: 11/22/2011)
11/22/2011	43	REPLY to re 38 *Response to Motion for Necessary Expenses* filed by Lynne Hales Chafin. (Powers, Kelly) (Entered: 11/22/2011)
11/30/2011		Pursuant to F.R.A.P. 11(c), the Clerk of the District Court for the Northern District of Alabama certifies that the record is complete for purposes of this appeal re: 39 Notice of Appeal, Appeal No. 11-15355CC. The entire record on appeal is available electronically (ASL) (Entered: 11/30/2011)
12/05/2011	44	ORDER that ruling is withheld on 36 pla's motion for attorney fees and necessary expenses and

		said motion is removed from court's pending docket subject to reinstatement upon conclusion of the appeal. Signed by Judge Inge P Johnson on 12/5/11. (ASL) (Entered: 12/05/2011)
02/06/2012	45	NOTICE by Lynne Hales Chafin *Appeal Court Dismissing Appeal* (Attachments: # 1 Exhibit Appeal Order)(Cullen, Stephen) (Entered: 02/06/2012)
02/06/2012	46	MANDATE of USCA as to 39 Notice of Appeal filed by Jeffrey Lee Chafin; pla-appellee Lynne Hales Chafin's motion for leave to dismiss dft-appellant Jeffrey Lee Chafin's appeal from the district court's October 13, 2011 order granting Lynne's petition for return of their daughter, EEC, to Scotland is GRANTED; Further, the case is REMANDED with instructions for the district court to VACATE the October 13, 2011 order and DISMISS the case as moot (ASL) (Entered: 02/06/2012)
02/22/2012	47	RESPONSE to *Petitioner's Notice Regarding Conclusion of Appeal* filed by Jeffrey Lee Chafin. (Attachments: # 1

		Exhibit "A", # 2 Exhibit "B", # 3 Exhibit "C")(Manely, Michael) (Entered: 02/22/2012)
02/23/2012	48	ORDER that petitioner is allowed through February 27, 2012, to submit a reply. Signed by Judge Inge P Johnson on 2/23/12. (ASL) (Entered: 02/23/2012)
02/27/2012	49	REPLY to re 47 *Response to Notice* filed by Lynne Hales Chafin. (Powers, Kelly) (Entered: 02/27/2012)
03/07/2012	50	MEMORANDUM OPINION and ORDER granting 36 MOTION for Attorney Fees *and Necessary Expenses* filed by Lynne Hales Chafin; total award of fees, costs and expenses awarded to petitioner and to be paid by respondent is the sum of $91,575.59. Signed by Judge Inge P Johnson on 3/7/12. (ASL) Modified on 3/7/2012 - text (ASL). (Entered: 03/07/2012)
03/07/2012	51	ORDER that this court's Order of October 13, 2011, is VACATED. This case is DISMISSED as MOOT. Signed by Judge Inge P Johnson on

		3/7/12. (ASL) (Entered: 03/07/2012)
04/05/2012	52	NOTICE OF APPEAL by Jeffrey Lee Chafin. Filing fee $ 455, receipt number 1126-1632933. (Manely, Michael) Modified on 4/6/2012 - NDAL receipt #B4601032507 (ASL). (Entered: 04/05/2012)
04/09/2012		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 52 Notice of Appeal (KGE,) (Entered: 04/09/2012)
04/19/2012	53	USCA Case Number 12-11870-CC for 52 Notice of Appeal filed by Jeffrey Lee Chafin. (ASL) (Entered: 04/19/2012)
05/02/2012	54	ORDER of USCA as to 52 Notice of Appeal filed by Jeffrey Lee Chafin; issue of whether appellee is entitled to attorney's fees pursuant to 42:11607(b)(3), and if so, the amount to be awarded, is REMANDED to district court for consideration and disposition (ASL) (Entered: 05/02/2012)
05/11/2012	55	MOTION for Attorney Fees *Necessary Appellate Expenses* by Lynne Hales Chafin. (Attachments: # 1 Exhibit A, # 2

		Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I)(Powers, Kelly) (Entered: 05/11/2012)
05/14/2012	56	ORDER re 55 MOTION for *Necessary Appellate Expenses* filed by Lynne Hales Chafin; respondent is allowed 14 days to respond to said motion. Signed by Judge Inge P Johnson on 5/14/12. (ASL) (Entered: 05/14/2012)
05/22/2012	57	Clerk's Entry of Dismissal issued as a MANDATE of USCA pursuant to appellant Jeffrey Lee Chafin's motion for voluntary dismissal as to 52 Notice of Appeal filed by Jeffrey Lee Chafin (ASL) (Entered: 05/22/2012)
05/29/2012	58	RESPONSE in Opposition re 55 MOTION for Attorney Fees *Necessary Appellate Expenses* filed by Jeffrey Lee Chafin. (Manely, Michael) (Entered: 05/29/2012)
06/05/2012	59	MEMORANDUM OPINION AND ORDER granting 55 Motion for Attorney Fees,k the

		petitioner is awarded the sum of $2,500.00 appellate fees and expenses, to the paid by the respondent. Signed by Judge Inge P Johnson on 6/5/2012. (KAM,) (Entered: 06/05/2012)

United States Court of Appeals
for the Eleventh Circuit

11-15355

Lynne Chafin v. Jeffrey Chavin

11/16/2011	CIVIL APPEAL DOCKETED. Notice of appeal filed by Appellant Jeffrey Lee Chafin on 11/14/2011. Fee Status: Fee Paid. Appellant brief due 40 days from 11/16/2011.
11/30/2011	Public Communication: Appellant's notice of FRAP 10(b)(1)(B) stating transcripts are on file..
11/30/2011	Appellant's Certificate of Interested Persons and Corporate Disclosure Statement filed by Appellant Jeffrey Lee Chafin.
11/30/2011	Civil Appeal Statement filed by Attorney Michael E. Manely for Appellant Jeffrey Lee Chafin.
12/01/2011	APPEARANCE of Counsel filed by Michael E. Manely for Jeffrey Lee Chafin.
12/02/2011	APPEARANCE of Counsel filed by Stephen John Cullen for Lynne Hales Chafin.
12/02/2011	APPEARANCE of Counsel filed by Kelly Ann Powers for Lynne Hales Chafin.

12/06/2011	MOTION to dismiss appeal as moot, for attorney's fees filed by Appellee, Opposition to Motion is Unknown [6444336-1]--[Edited 03/06/2012 by AGW]
12/15/2011	RESPONSE to Motion to dismiss appeal as moot filed by Appellant Jeffrey Lee Chafin in 11-15355 , Motion for attorney's fees filed by Appellant Jeffrey Lee Chafin in 11-15355 filed by Attorney Michael E. Manely for Appellant Jeffrey Lee Chafin Appellant Jeffrey Lee Chafin Appellant Jeffrey Lee Chafin.
12/16/2011	Appellee's Certificate of Interested Persons and Corporate Disclosure Statement filed by Appellee Lynne Hales Chafin.
12/23/2011	Confirmation letter for a 7-day extension filed by Appellant Jeffrey Lee Chafin.
12/27/2011	Over the phone extension granted by clerk. Appellant's brief due on 01/03/2012 as to Appellant Jeffrey Lee Chafin.
01/05/2012	Appellant's Brief filed for Jeffrey Lee Chafin. Deficiencies: no Table of Record References, references to the record do not conform with 11th Cir. R. 28-5, no e-brief uploaded. Service date: 01/03/2012 [11-15355] Attorney for Appellee: Cullen - US mail; Attorney for Appellee: Kelley - US mail; Attorney for Appellee: Powers US mail.

01/05/2012 Expanded Record Excerpts filed by Attorney Michael E. Manely for Appellant Jeffrey Lee Chafin. Deficiencies: no Table of Record References, missing portions of the record referenced in the brief. Service date: 01/03/2012 US mail - Attorneys for Appellee: Cullen, Kelley, Powers.

01/05/2012 Modified Expanded Record Excerpts (4 VOLUMES) received on 02/06/2012 from Appellant Jeffrey Lee Chafin. All deficiencies have been corrected.--[Edited 02/15/2012 by JOD]

01/09/2012 1st Supplemental Certificate of Readiness filed as to Appellant Jeffrey Lee Chafin.

01/09/2012 Record on Appeal filed. Exhibit Folder, 2 volumes.

01/23/2012 Notice of deficient Appellant's Brief filed by Attorney Michael E. Manely for Appellant Jeffrey Lee Chafin. Deficiencies: no Table of Record References, references to the record do not conform with 11th Cir. R. 28-5, no e-brief uploaded.

01/23/2012 Notice of deficient Expanded Record Excerpts filed by Attorney Michael E. Manely for Appellant Jeffrey Lee Chafin. Deficiencies: no Table of Record References, missing portions of the record referenced in the brief.

02/03/2012	Appellee's Brief filed by Appellee Lynne Hales Chafin. Service date: 02/03/2012 3rd party Attorney for Appellant: Manely; email - Attorney for Appellants: Manely, Presto; Attorney for Appellees: Cullen, Kelley, Powers. (ECF: Kelly Powers)
02/06/2012	Corrected Appellant's Brief filed by Appellant Jeffrey Lee Chafin. Service date: 02/06/2012 US mail Attorney for Appellees: Cullen, Kelley, Powers; email - Attorney for Appellees: Cullen, Kelley, Powers. (ECF: Michael Manely)
02/06/2012	ORDER: Appellee Lynne Hales Chafin ("Lynne") motion for leave to dismiss Appellant's appeal from the district court's October 13, 2011 order granting Lynne's petition for return of their daughter to Scotland is GRANTED. Further, the case is REMANDED with instructions for the district court to VACATE the October 13, 2011 order and DISMISS the case as moot.[6444336-2] (FMH and EEC)--[Edited 02/28/2012 by JC]
02/06/2012	Received paper copies of EBrief filed by Appellee Lynne Hales Chafin.
02/06/2012	Received paper copies of EBrief filed by Appellant Jeffrey Lee Chafin.

02/27/2012	*MOTION for initial hearing en banc filed by Appellant Jeffrey Lee Chafin. Opposition to Motion is Unknown [6502907-1]* (ECF: Michael Manely)
04/03/2012	ORDER: Jeffrey Lee Chafin's petition for hearing en banc, which is treated as a motion for reconsideration of our February 6, 2012 order granting Lynne Hales Chafin's motion to dimiss this appeal , is DENIED. [6502907-2] (FMH and EEC)
04/27/2012	ORDER: The issue of whether Appellee is entitled to attorney's fees, and, if so, the amount to be awarded, is hereby REMANDED to district court for consideration and disposition. [6444336-3] (EEC and FMH)
05/09/2012	Notice of Writ of Certiorari filed by Appellant Jeffrey Lee Chafin. SC# 11-1347.
06/18/2012	Checked status of ceritorari filed as to Appellant Jeffrey Lee Chafin Pending.
08/13/2012	Writ of Certiorari filed by Appellant Jeffrey Lee Chafin is GRANTED. SC# 11-1347.

PETITIONER'S BRIEF

No. 11-1347

In The Supreme Court of the United States

JEFFREY LEE CHAFIN,

Petitioner,

v.

LYNNE HALES CHAFIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED

Under the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610, the United States is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction. The Convention allows a parent to petition for the return of his or her minor child to the child's country of habitual residence. A United States district court may issue an order returning the child to the country that it determines to be the child's country of habitual residence for that country's courts to render a final custody decision.

The question presented is:

Does an appeal of a district court's ruling granting a return petition become moot after the child in question returns to the country that the district court found was the child's country of habitual residence?

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BRIEF OF PETITIONER

Petitioner Jeffrey Lee Chafin respectfully asks this Court to reverse the judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion is unpublished but is reprinted at Pet. App. 1. The orders of the U.S. District Court for the Northern District of Alabama are unpublished but are reprinted at Pet. App. 3 and 13.

JURISDICTION

The court of appeals entered its judgment on February 6, 2012. Petitioner filed a timely petition for a writ of certiorari on May 7, 2012, which this court granted on August 13, 2012. This court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT TREATY AND STATUTORY PROVISIONS

The Hague Convention on the Civil Aspects of International Child Abduction October 25, 1980, T.I.A.S. No. 11, 670, 1343 U.N.T.S. 89 (App. 1a-22a) [hereinafter the Hague Convention or Convention] and the International Child Abduction Remedies Act, Pub. L.

No. 100-300, 102 Stat. 437 (codified as amended at 42 U.S.C. §§ 11601-11611) (App. 23a-41a) are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

The United States is a signatory to the 1980 Hague Convention, which was adopted to remove the incentive for a parent to take a child across borders in search of more favorable custody laws. Under the Convention, each signatory agrees that it will use its normal system of justice to determine a child's country of habitual residence. Except in circumstances not relevant here, each signatory further agrees to return the child to the country of habitual residence for final custody proceedings to take place there. Signatories' courts recognize and defer to one another's Hague Convention judgments in accordance with various statutes and practices of comity.

When a United States district court decides that a child's habitual residence is not in the United States, its decision thus acts as a threshold choice-of-law and choice-of-forum determination. The court cedes the final custody determination to tribunals in the foreign country. Its judgment operates like a traffic signal, giving a green light to the foreign country's courts and a red light to custody proceedings in the United States, as well as to any efforts by the losing party to petition the foreign court to transfer the dispute back to the United States.

If not stayed, an order granting a Hague Convention petition gives the plaintiff permission to remove the child from the United States, at least temporarily. This allows the child to return to the country that was found to be his or her habitual residence while an appeal is pending, thereby allowing the appellate process to proceed (which the Convention contemplates) while honoring the Convention's goal of returning children to their respective habitual residences promptly.

A federal court of appeals may continue to review a district court's grant of a Hague Convention petition even after the prevailing plaintiff has taken the child to a foreign country (here, the United Kingdom, specifically Scotland).[1] First, an appellate reversal could lead the district court on remand to order the plaintiff to return the child to the United States, by exercising an inherent equitable power to grant relief and restore the status quo ante. Second, a reversal would switch the traffic light for the U.S. custody proceeding from red to green, thereby allowing state courts (here, Alabama's) to adjudicate the merits of this custody dispute instead of deferring to a decision of Scotland's courts. As a corollary, reversal would switch the traffic light for the Scottish custody proceeding from

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[1] The United Kingdom of Great Britain and Northern Ireland (U.K.), a signatory to the Hague Convention, comprises the countries of England, Wales, Scotland, and Northern Ireland. Within the United Kingdom, Scotland has its own body of law and courts, though appeals ultimately go up to the Supreme Court of the United Kingdom (formerly the Appellate Committee of the House of Lords).

green to red. That would allow the losing party to file his own Hague Convention petition in Scotland for return of the child to the United States and would direct the Scottish courts to defer to the U.S. judicial proceedings. Since any of these outcomes would affect the matter in issue here, this case is not moot.

I. The Hague Convention

1. The Convention was adopted in 1980 by the Fourteenth Session of the Hague Conference on Private International Law. Its purpose is to deter and counteract the removal of a minor child (up to sixteen years old) from his or her country of habitual residence by a parent seeking custody of the child in another, presumably more favorable, jurisdiction. Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* [hereinafter *Pérez-Vera Report*], *in* ACTES ET DOCUMENTS DE LA QUATORZIÉME SESSION, TOME III, at 426, 444-45 (1982).[2]

The Convention binds its signatories to return a wrongfully removed child to the child's country of habitual residence. "[A]bove all[, the] [C]onvention

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[2] "[Professor Pérez-Vera's] explanatory report is recognized by the [Hague] Conference [on Private International Law] as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it." *Hague International Child Abduction Convention: Text and Legal Analysis*, 51 Fed. Reg. 10494, 10503 (Mar. 26, 1986). *Cf. Abbott* v. *Abbott*, 130 S. Ct. 1983, 1995 (2010).

. . . seeks to prevent the international removal of children by creating a system of close co-operation among the judicial and administrative authorities of the Contracting States." *Pérez-Vera Report* at 435. One way in which the Convention promotes cooperation is by acting as a traffic control system, designating which court should adjudicate final custody under which body of law. Thus, subject to two narrow exceptions not applicable here, once a court in country A receives notice of a Hague Convention finding that a child has been wrongfully removed from country B to country A, country A's courts "shall not decide on the merits of rights of custody." Hague Convention art. 16, App. 9a-10a.

The process for ensuring return, however, is left to the signatories' existing procedural systems. It encourages "expeditious" procedures but imposes no "[ ]obligatory" time limits. *Pérez-Vera Report* at 457-58. Rather than dictating procedures, the Convention "depend[s] largely on co-operation among the Central Authorities," which bear "reciprocal" obligations to work together. *Id.* at 435; *see also id.* at 436. The Convention promotes swift, "*temporary* solution[s]" that do not resolve the issue of final custody. *Id.* at 436 (emphasis added).

The Hague Conference on Private International Law has issued guidance on best practices for enforcement, particularly to address concerns about returning children to their respective countries of habitual residence. *See* GUIDE TO GOOD PRACTICE UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON

THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, pt. 4, at xvii-xviii (2010) [hereinafter GUIDE TO GOOD PRACTICE]. While the Conference has expressed concern that appeals may "delay enforcement," that concern focuses primarily on countries where return orders cannot be enforced "until [appeals] have all been exhausted." *Id.* at xx. Studies of Contracting States have revealed that enforcement procedures and the timing and availability of appeals vary widely across countries. *See* ANDREA SCHULZ, HAGUE CONVENTION ON PRIVATE INT'L LAW, ENFORCEMENT OF ORDERS MADE UNDER THE 1980 CONVENTION: A COMPARATIVE LEGAL STUDY 4-5, 25 (2006) [hereinafter A COMPARATIVE LEGAL STUDY].

To address this variation, the Conference recommended that coercive or physical enforcement of a return order not take place until the order becomes final and can no longer be appealed. But it noted with approval that many countries have made their return orders effective immediately even while appeals are pending, as a solution for systems where appellate review may be "lengthy." GUIDE TO GOOD PRACTICE at 19.

2. Because it is also important to ensure that habitual-residence determinations are correct, "almost all jurisdictions," including the United States, authorize appeals of return orders under the Convention. A COMPARATIVE LEGAL STUDY at 22 (study of a majority of signatories). In 1988, Congress passed the International Child Abduction Remedies Act [hereinafter ICARA], making the United States a signatory

to the Convention. App. 23a-41a. ICARA gives state and federal courts concurrent jurisdiction over suits under the Convention, to speed up enforcement and avoid delays from litigation over jurisdiction. *See International Child Abduction Act: Hearing on S. 1347 Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary*, 100th Cong. 32-33 (1988) [hereinafter *Hearing on S. 1347*] (statement of Peter H. Pfund, Assistant Legal Advisor for Private International Law, Department of State).

United States law, like that of fourteen other countries, makes a return order immediately enforceable, allowing a child to be taken to another country while the appeal is pending. A COMPARATIVE LEGAL STUDY at 31 & n.94. Immediate enforceability ameliorates the Conference's concern that appeals could delay the return of a child. *See* NIGEL LOWE ET AL., HAGUE CONFERENCE ON PRIVATE INT'L LAW & THE INT'L CTR. FOR MISSING & EXPLOITED CHILDREN, ENFORCEMENT OF ORDERS MADE UNDER THE 1980 CONVENTION: AN EMPIRICAL STUDY 3 (2006). Indeed, studies and reports hold the United States up as an example of good practice in enforcing the Convention. *See, e.g.*, *id.* at 6-7. U.S. courts expedite appeals and require few preconditions before returning a child. *Id.* at 43; A COMPARATIVE LEGAL STUDY at 21.

While ICARA streamlines the process of adjudicating jurisdiction, it nonetheless anticipates appeals of, or other challenges to, a return order. ICARA "is not intended to deny the possibility of appeal from, or some other procedure to question, a return order or a

decision denying a return order." *Hearing on S. 1347* at 32-33 (statement of Peter H. Pfund) (discussing full faith and credit); *see also International Child Abduction Act: Hearing on H.R. 2673 and H.R. 3971 Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 100th Cong. 120 (1988) (letter to Chairman Barney Frank from Thomas M. Boyd, Acting Att'y Gen.) (opposing concurrent jurisdiction but envisioning that the proposed system would involve appeals).

II. Statement of Facts

A. Factual Background

Petitioner Jeffrey Lee Chafin is a citizen of the United States and a Sergeant First Class in the United States Army. *See* 2 Tr. 71. His wife, respondent Lynne Hales Chafin, is a citizen of the United Kingdom.

In March 2006, Sergeant and Mrs. Chafin married in Scotland and moved in together in Germany, where Sergeant Chafin was stationed. 1 Tr. 37-38. Their daughter, E.C., was born in January 2007, and the three lived together in Germany until Sergeant Chafin deployed to Afghanistan later that year. 1 Tr. 34, 37-38. During Sergeant Chafin's fifteen-month tour of duty, Mrs. Chafin took E.C. to Scotland, where the two remained after Sergeant Chafin returned to Germany. 1 Tr. 40-42.

In February 2009, Sergeant Chafin was transferred to Huntsville, Alabama. 2 Tr. 71-72. Mrs. Chafin and E.C., who has dual U.S. and U.K. citizenship, traveled to Alabama to help find a suitable home. 2 Tr. 73-74; 1 Tr. 16, 135. After they bought a house, E.C. traveled back to Scotland to stay with her mother before returning to Alabama to live in her father's sole care for more than two months. 1 Tr. 154-55. E.C. then spent time in both Scotland and Alabama before she and Mrs. Chafin returned to Alabama in February 2010. 1 Tr. 155; 2 Tr. 73. After moving to Alabama, Mrs. Chafin helped remodel their new home and applied for part-time work. *See* 1 Tr. 206, 230-31, 241, 244-47.

After taking up residence in the United States, however, Mrs. Chafin began to threaten to leave the country and take E.C. with her. 2 Tr. 115-16. Thus, in May 2010, Sergeant Chafin filed an Alabama state court action petitioning for divorce and seeking a temporary custody and restraining order. Pet. App. 6; 2 Tr. 173-74.[3] Thereafter, Mrs. Chafin spent more

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[3] Mrs. Chafin has repeatedly asserted that Sergeant Chafin hid E.C.'s U.S. and U.K. passports in May 2010. 1 Tr. 78, 227-28. Sergeant Chafin has contested this characterization, testifying that he complied with the Alabama state court's directions and returned both passports to the family's home after briefly taking them with him to work. 2 Tr. 117-21. Although the district court credited Mrs. Chafin's testimony regarding the U.K. passport, Pet. App. 8 & n.6, Mrs. Chafin conceded that she had access to E.C.'s U.S. passport from at least August 2010 on, and therefore could have taken E.C. to Scotland. 1 Tr. 227-29. She chose instead to stay in the United States.

than $1,000 in an attempt to obtain permanent residency in the United States. 1 Tr. 294, 332-33. The couple continued to live in the same house in Alabama for the rest of the year, though they stayed in separate bedrooms from the fall onwards. 2 Tr. 88; Pet. App. 8. The Alabama state court scheduled a hearing in the state divorce and custody case, and Mrs. Chafin hired local counsel to obtain a continuance of the hearing. 1 Tr. 283-84.

In late 2010, Mrs. Chafin was arrested for domestic violence. 1 Tr. 260; 2 Tr. 18-23, 87-92. That arrest alerted officials of the U.S. Citizenship and Immigration Services to the fact that Mrs. Chafin had overstayed her visa. 1 Tr. 268. They detained her at the end of 2010 and later deported her in February 2011. 1 Tr. 118, 268. The domestic violence charge was dropped after her deportation. 1 Tr. 261, 270. From then until the district court proceedings ended, Sergeant Chafin was E.C.'s sole caregiver. E.C. went to school in Alabama from the summer of 2010 through September 2011 (at the same school that she had attended in 2009) and then in Virginia, where Sergeant Chafin was later stationed. 2 Tr. 203-06.

B. Procedural History

1. On May 2, 2011, Mrs. Chafin initiated the proceedings below in the U.S. District Court for the Northern District of Alabama. She sought an order directing E.C.'s prompt return to Scotland under the Hague Convention and ICARA. She then moved to

stay the state-court custody proceedings in favor of the federal Hague Convention action. Accordingly, on Mrs. Chafin's motion, the Alabama state trial court stayed its action pending resolution of the federal suit. *Chafin* v. *Chafin*, No. 2110421, 2012 WL 3055522, at *1 (Ala. Civ. App. July 27, 2012) [hereinafter *Chafin* (Alabama)]. Sergeant Chafin moved to dismiss that suit and then refiled it; the state trial court again stayed it. *Id.*

The federal district court held a two-day bench trial on October 11 and 12, 2011. Immediately after closing arguments, the court ruled orally in favor of Mrs. Chafin, finding that E.C.'s habitual residence was in Scotland and granting the petition to return E.C. to Scotland.

Within twenty minutes of the oral ruling on October 12, Sergeant Chafin moved the district court to stay its order pending appeal. The court denied that motion sixteen minutes later and issued a one-paragraph order permitting Mrs. Chafin to take E.C. to Scotland that same day. Pet. 7; Pet. App. 13-14; Opp. 4-5. Within a few hours, before the district court even issued a written opinion, Mrs. Chafin, with E.C. in tow, boarded a flight out of the country, to Canada, and from there flew to Scotland. The next day, the court issued its full written opinion and order. Pet. App. 3, 12. Sergeant Chafin filed a timely notice of appeal.

2. Sergeant Chafin provided a copy of the federal district court's judgment to the Alabama state

court. *Chafin* (Alabama), 2012 WL 3055522, at *1. In November 2011, Mrs. Chafin moved to dismiss the second state-court action. *Id.* at *2. She argued, based on the federal district court's judgment, that she and E.C. were residents of Scotland, not Alabama, and thus that the Alabama trial court lacked jurisdiction over them. *Id.* The state trial court granted that motion. *Id.*

3. In December 2011, Mrs. Chafin initiated custody proceedings in Scotland. Initial Writ, *Hales* v. *Chafin*, No. F544/11 (Sheriffdom of S. Strathclyde, Dumfries & Galloway at Airdrie, Scotland, filed Dec. 21, 2011). Her initial writ (complaint) specifically pleaded that "on or around the 13th October 2011 [*sic*]," Mrs. Chafin "was allowed to return home to this jurisdiction with [E.C.], the [U.S. District] Court having decided that [Sergeant Chafin] wrongfully retained [E.C.] in the United States and wrongfully breached Article 16 of the Hague Convention." *Id.* at Condescendence ¶ 2. It further pleaded that the federal district court had granted Mrs. Chafin's Hague Convention petition to return E.C. to Scotland, had denied Sergeant Chafin's stay application, and had allowed Mrs. Chafin to return with E.C. to Scotland to begin custody proceedings there. *Id.* ¶ 11. The Scottish court granted Mrs. Chafin an interim custody order and a preliminary injunction barring Sergeant Chafin from removing E.C. from Scotland. Form F14, Form of Warrant of Citation in Family Action, *Hales* v. *Chafin*, No. F544/11 (Sheriffdom of S. Strathclyde, Dumfries & Galloway at Airdrie,

Scotland, filed Dec. 22, 2012 [*sic* – should be 2011]); *see* Opp. 5. The Scottish court has taken no further action on the matter.

4. In February 2012, the Eleventh Circuit dismissed Sergeant Chafin's appeal as moot in a one-paragraph per curiam order. Pet. App. 1-2. The order gave no reasons but merely cited the Eleventh Circuit's prior decisions in *Pacific Insurance Co.* v. *General Development Corp.*, 28 F.3d 1093 (11th Cir. 1994) (largely inapposite), and *Bekier* v. *Bekier*, 248 F.3d 1051 (11th Cir. 2001). On similar facts, *Bekier* had dismissed an appeal of a return order as moot, reasoning that because the child "has already returned" to the foreign country, there was no relief the court of appeals could offer, and "any words by us would be merely advisory." 248 F.3d at 1054. The court below remanded this case with instructions to vacate the October 13 order and dismiss the case as moot. Pet. App. 1-2. This petition followed.

5. In July 2012, the Alabama Court of Civil Appeals affirmed the lower state court's dismissal of the custody claim for lack of jurisdiction but reversed the dismissal of the divorce part of the action. *Chafin* (Alabama), 2012 WL 3055522, at *4. It expressly relied on the federal district court's ruling as the ground for affirming the dismissal of the custody claim, stating:

> *Based on the federal court's determination that the child's residence was in Scotland* and that the child was not a resident of Alabama,

> then, at the commencement of the second divorce action, the child's "home state" was Scotland. Because another "state" had jurisdiction to enter a child-custody determination pursuant to the UCCJEA [Uniform Child Custody Jurisdiction and Enforcement Act (1997)], *the trial court in Alabama lacked subject-matter jurisdiction* to make an initial child-custody determination in the present case.

Id. (emphases added).

SUMMARY OF THE ARGUMENT

1. An appeal is not moot simply because relief is uncertain, speculative, or difficult. To find mootness, it must be literally impossible for a court to grant *any* effectual relief. Because the court of appeals' judgment could – and likely would – affect the parties' legal rights, the appeal is not moot.

2a. Sergeant Chafin's appeal could provide him with relief in the form of a reversal of the district court's order. In that case, the district court on remand would have the inherent power to rectify its erroneous grant of Mrs. Chafin's return petition. The district court's inherent power to issue an order restoring the status quo ante is not affected by E.C.'s and Mrs. Chafin's current absence from the United States, particularly because Mrs. Chafin submitted to the court's jurisdiction by filing suit.

The decision below confused a federal court's potential order of relief (by ordering a child's return to the United States) with enforcement of that relief. A return order alters the parties' legal relations and obligations regardless of whether enforcement is physically possible right now. A return order issued by the U.S. district court could be enforced by a Scottish court, which would recognize the U.S. judgment, or by the U.S. district court itself if Mrs. Chafin returned to the United States. While that eventuality may seem unlikely right now, it is not impossible, as would be required for the case to be moot. Even suits involving persons living abroad or fugitives have not been dismissed as moot, since they could return or be extradited to the United States. Likewise, federal appeals are not moot if they may influence proceedings in another forum.

2b. Even if, after reversal and remand, the district court did not order the child returned to the United States, reversal of the court's erroneous ruling would indirectly afford Sergeant Chafin relief by influencing the Alabama custody proceedings. Under the Hague Convention and the UCCJEA, the district court's finding of wrongful removal switched the light to red, barring further action in the state custody proceeding. *See* Hague Convention art. 16, App. 9a-10a; UCCJEA §§ 302, 303, 313. The Alabama courts thus dismissed the state custody proceeding for lack of subject-matter jurisdiction. The state appellate court relied explicitly on the federal district court's ruling that E.C. was habitually resident in Scotland

and that custody proceedings should go forward there. A reversal and favorable ruling on remand would switch the traffic light for the Alabama custody proceeding from red to green, allowing the state courts to determine final custody.

2c. A favorable federal ruling on remand would likewise switch the traffic light for the Scottish custody proceeding from green to red, staying it. Under a U.K. statute and as a matter of comity, Scottish courts recognize and defer to foreign decisions, both in general and specifically with respect to cases involving parental rights.

That deference accords with the Hague Convention's general reliance on reciprocity and deference to the judgments of other signatories. Here, Mrs. Chafin's Scottish lawyers twice specifically pleaded the federal district court's judgment of wrongful removal as a predicate to their Scottish custody action. A reversal would remove the foundation of that action, instructing the Scottish courts to defer to the Alabama proceedings instead of the other way around. It would also have preclusive effect, establishing E.C.'s habitual residence in the United States. And it would allow Sergeant Chafin to file his own affirmative Hague Convention petition in Scotland seeking E.C.'s return to the United States.

2d. This Court has made clear that the failure to obtain a stay is irrelevant to mootness analysis. Here, the district court denied Sergeant Chafin's stay application within minutes of its ruling. Mrs. Chafin

left the country a few hours later, leaving Sergeant Chafin no chance to seek a stay from the court of appeals.

3. Sound prudential considerations support allowing Hague Convention appeals to proceed, thus letting U.S. courts retain jurisdiction over U.S. citizen children who are taken abroad. Doing so removes the incentive for victorious parents to flee with their children before appellate courts can review orders. The appellate process is consistent with the Hague Convention, ICARA, and the UCCJEA. It is important to ensure justice, promote the accuracy of judgments, and prevent a single district court's order from distorting the status quo by changing where a child resides during the pendency of the custody litigation. Appeals further protect U.S. citizens' access to U.S. courts to determine the custody of their U.S. citizen minor children.

ARGUMENT

A case is moot only when relief is literally impossible, not when it is merely contingent upon some future event that may or may not occur. Sergeant Chafin's appeal is not moot because it is possible that a favorable ruling from the Court of Appeals would provide him some measure of relief, if not all the relief he seeks. No particular threshold of probability is required. Mrs. Chafin may have made it more difficult for the federal courts to provide the relief

Sergeant Chafin seeks, but she did not make it impossible.

A favorable federal judgment could afford Sergeant Chafin direct relief either in the United States or in the United Kingdom, specifically Scotland. It could also benefit him indirectly, by influencing the Alabama or Scottish custody proceedings or allowing Sergeant Chafin to file a new Hague Convention petition in Scotland.

I. An Appeal Is Not Moot Unless Relief Is Impossible

A federal court cannot "give opinions upon moot questions or abstract propositions, or . . . declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992) (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)). This rule applies to appeals as well as to cases in the first instance. *E.g.*, *United States* v. *Juvenile Male*, 131 S. Ct. 2860, 2864 (2011) (per curiam).

But an appeal is not moot as long as the ultimate ruling could possibly affect the parties' rights. Mootness requires that relief be impossible. Nothing less than that – not uncertainty, difficulty, or speculativeness of relief – will suffice to make a case moot. "A case becomes moot only when it is *impossible* for a court to grant *any* effectual relief whatever to the prevailing party." *Knox* v. *Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (emphases

added) (internal quotation marks omitted). The "availability of [a] possible remedy is sufficient to prevent [a] case from being moot." *Church of Scientology*, 506 U.S. at 13. Courts "are concerned only with the question whether *any* relief can be ordered." *Id.* at 13 n.6 (emphasis in original). Even the "mere possibility" of a remedy precludes a finding that a case is moot. *Sibron* v. *New York*, 392 U.S. 40, 55 (1968) (internal quotation marks omitted).

For a case to be moot, therefore, it must be "literally impossible for the court" to undo actions previously taken, something akin to physical or temporal impossibility. *Fawcett* v. *McRoberts*, 326 F.3d 491, 496 (4th Cir. 2003), *abrogated on other grounds by Abbott*, 130 S. Ct. 1983. For instance, no court can go back in time to take away sign-language services received by a student who has already graduated. *Univ. of Tex.* v. *Camenisch*, 451 U.S. 390, 398 (1981). No court can revive an expired bill, unamend a federal statute, or reenact a repealed law. *Burke* v. *Barnes*, 479 U.S. 361, 363-65 (1987); *U.S. Dep't of Treasury* v. *Galioto*, 477 U.S. 556, 559-60 (1986); *Kremens* v. *Bartley*, 431 U.S. 119, 128-29 (1977). No court can award bail to a defendant already convicted, *Murphy* v. *Hunt*, 455 U.S. 478, 481-84 (1982), nor grant relief to a criminal defendant or inmate after he dies. *Dove* v. *United States*, 423 U.S. 325, 325 (1976) (per curiam); *Hailey* v. *Russell*, 394 U.S. 915, 915 (1969) (order); *McNeill* v. *Carroll*, 369 U.S. 149, 149 (1962) (per curiam). And no court can grant relief on a private claim that the parties have already

settled. *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 26 (1994); *Buck's Stove & Range Co.* v. *Am. Fed. of Labor*, 219 U.S. 581, 581 (1911) (per curiam).

In situations such as these, in short, "there is no way to unscramble the egg." *Fawcett*, 326 F.3d at 496 (internal quotation marks omitted). That is not the case here.

II. Sergeant Chafin's Appeal Is Not Moot Because It Could Affect the Matter in Issue

Here, if E.C. had died pending appeal, it would be impossible for any court to effectuate her return. *E.g.*, *Slagenweit* v. *Slagenweit*, 63 F.3d 719, 720 (8th Cir. 1995) (per curiam). If she had reached the age of majority, she would no longer be subject to any child-custody order. If her parents had reconciled, settled in Alabama, and jointly moved to dismiss the suit, no controversy would remain.

No such mooting events, however, occurred in this case. On the contrary, appellate reversal of the district court's order could bring about not just the possibility of relief for Sergeant Chafin, but even the probability or certainty of relief.

A. If Its Order Is Reversed on Appeal, the District Court Could Order the Child's Return

1. The Courts Below Have Inherent Power to Correct an Erroneous Ruling

"Article III creates[ ] not a batch of unconnected courts, but a judicial department composed of 'inferior Courts' and 'one supreme Court.'" *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995). An appealable final judgment of the district court never concludes an Article III controversy, for "[w]ithin that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole." *Id.*

When a district court's judgment is reversed on appeal, upon remand the district court has "inherent" power "to undo what it had no authority to do originally, and in which it, therefore, acted erroneously, and to restore, as far as possible, the parties to their former position." *Nw. Fuel Co.* v. *Brock*, 139 U.S. 216, 219 (1891) (reversing judgment of district court that it lacked power to order plaintiffs to return payment from defendants); *accord O'Hara* v. *MacConnell*, 93 U.S. 150, 154 (1876) ("'If the judgment is reversed, it is the duty of the court to restore the parties to their rights.'") (quoting *Erwin* v. *Lowry*, 48 U.S. (7 How.) 172, 184 (1849)). "Jurisdiction to correct what had been wrongfully done must remain with the court so long as the parties and the case are properly before it,

either in the first instance or when remanded to it by an appellate tribunal." *Nw. Fuel Co.*, 139 U.S. at 219.[4]

As this Court summarized this "rule . . . of general application," *Atl. Coast Line R. Co.* v. *Florida*, 295 U.S. 301, 309 (1935), "one of the equitable powers, inherent in every court" is "to correct that which has been wrongfully done by virtue of its process." *Arkadelphia Milling Co.* v. *St. Louis Sw. Ry. Co.*, 249 U.S. 134, 145-46 (1919); *accord* RESTATEMENT (FIRST) OF RESTITUTION § 74 (1937). This equitable power may be exercised by the original tribunal on remand, or after reversal without remand, or by an appellate court as an incident of its power to correct errors. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 18 cmt. b (2011).[5]

"Ordinarily, compliance [with a trial court order] does not moot an appeal [of that order] if it remains possible to undo the effects of compliance." 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.2.2 (3d ed. 2008). In a "familiar line of cases concerning appellate review of [money or property] judgments . . . . [s]ince property transferred or money

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[4] A party may be absent from the country yet still be properly before the court. *See infra* pp.25-28.

[5] While in some circumstances a district court could withhold equitable relief (if, for example, returning a child to the United States would jeopardize the child's health or welfare), *see* Hague Convention art. 13(b), App. 8a, that is irrelevant to the mootness inquiry.

paid involuntarily pursuant to a judgment can be recovered, execution of the lower court's judgment pending appeal normally does not render the case moot." *Graddick* v. *Newman*, 453 U.S. 928, 945 n.* (1981) (opinion of Rehnquist, J.). "These cases represent merely a particularization of the rule that issuance of a court's mandate or obedience to its judgment does not bar timely appellate review." *Id.*; *see also, e.g.*, *Porter* v. *Lee*, 328 U.S. 246, 251 (1946) (holding case not moot on appeal because, even after a defendant complies with an injunction, "the court may by mandatory injunction restore the status quo").

This rule, and the consequent power to correct orders reversed on appeal, are properly invoked in child custody cases. *See* RESTATEMENT (FIRST) OF RESTITUTION § 74 cmt. o annotation ("Where defendant obtained custody of child from plaintiff through order which was subsequently reversed, plaintiff was entitled to restitution of custody of child.") (citing *Burns* v. *Bines*, 57 A.2d 188 (Md. 1948)).[6] In *Burns*, the appellate court addressed a situation in which "[a]ppellees obtained custody solely by an order which has since been reversed and is now a nullity." 57 A.2d at

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[6] Although return proceedings do not determine final custody rights, Hague Convention art. 19, App. 10a, they are kindred proceedings that determine the right to return a child to his country of residence. Accordingly, the UCCJEA provides that courts may enforce Hague Convention return orders as if they were child-custody determinations. UCCJEA § 302; *infra* pp.31-32.

188. The court saw "no difference in principle" between "cases regarding money or other property" and the custody case before it. *Id.* at 188-89 (citing *Atl. Coast Line*, 295 U.S. at 309, 310). "'If the judgment is reversed, it is the duty of the court to restore the parties to their rights.'" *Burns*, 57 A.2d at 189 (quoting *O'Hara*, 93 U.S. at 154, in turn quoting *Erwin*, 48 U.S. (7 How.) at 184). Using this Court's formulation from *Northwestern Fuel*, the court reiterated that "[t]he power is inherent in every court to undo what it had no authority to do originally, and in which it, therefore, acted erroneously, and to restore, as far as possible, the parties to their former position." *Burns*, 57 A.2d at 189.

Similarly, execution of the district court's judgment pending appeal of a Hague Convention return order does not moot a case. As the Fourth Circuit noted, in criticizing the Eleventh Circuit's decision in *Bekier*: "The overwhelming majority of other courts have . . . evidenced their agreement" that such cases are not moot "by routinely considering the merits of an appeal from an order returning a child to a foreign country, even when compliance with the order has resulted in the child's presence in a foreign country." *Fawcett*, 326 F.3d at 494 (collecting cases).

In holding such cases moot, *Bekier* failed to consider the scope of a federal court's inherent authority and equated a potential barrier to enforcement with mootness. 248 F.3d at 1054; *supra* p.13. The panel in this case perpetuated those errors. Had the Eleventh Circuit reached the merits of this case and reversed the district court's finding that E.C. habitually

resided in Scotland, on remand the district court could have entered judgment for Sergeant Chafin and ordered Mrs. Chafin to return E.C. That order would validly alter E.C.'s status and create *in personam* obligations. The authorities on default judgments and jurisdiction over fugitives make clear that a federal court's power to grant *relief* is independent of its immediate ability to *enforce* its order granting relief. *See infra* pp.27-28.

At the time of the appeal, the district court's order continued to have an effect on the parties: It kept E.C. in Scotland, barred the Alabama custody proceeding, allowed the Scottish custody proceeding to commence, and prevented Sergeant Chafin from obtaining an order for the return of his daughter. Conversely, reversing that order on appeal would also affect the parties, eliminating those obstacles to E.C.'s return. These very real practical effects not only meet, but greatly exceed, the low threshold for finding a case not moot.

2. The District Court's Power to Order Relief Survives Even if Mrs. Chafin and the Child Are Abroad

The fact that Mrs. Chafin took E.C. out of the country before the district court had even issued a written opinion does not deprive the court of its power to correct an erroneous ruling. By suing in the U.S. district court for E.C.'s return to Scotland, Mrs. Chafin submitted herself to the court's jurisdiction.

"[I]f a judicial proceeding is begun with jurisdiction over the person of the party concerned, it is within the power of a state to bind him by every subsequent order in the cause." *Michigan Trust Co.* v. *Ferry*, 228 U.S. 346, 354 (1913); *see also Ins. Corp. of Ireland, Ltd.* v. *Compagnie des Bauxite de Guinee*, 456 U.S. 694, 703 (1992) ("[A]n individual may submit to the jurisdiction of the court by appearance."). She is thus subject to a corrective order by the district court to return E.C. from Scotland to the United States, notwithstanding her departure from the jurisdiction.

Nor is it a barrier that both Mrs. Chafin and E.C. are currently abroad. As long as it does not interfere with another nation's sovereignty, "[a] District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction." *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 289 (1952). Even if the *res* is outside the jurisdiction, "courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*." *Phelps* v. *McDonald*, 99 U.S. 298, 308 (1878).

Moreover, it is possible that Mrs. Chafin could return to the United States of her own accord. Even after parties have been deported, criminal appeals are not moot because there remains the "*possibility* that [the defendants] could . . . re-enter this country on their own." *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983) (emphasis added); *accord United States* v. *Plancarte-Alvarez*, 366 F.3d 1058,

1063 (9th Cir. 2004), *amended on denial of reh'g*, 449 F.3d 1059 (9th Cir. 2006). As the Eleventh Circuit put it in another case, a case is not moot if the defendant "*may*, at some point, re-enter the United States," even if that possibility is only "speculative." *United States* v. *Orrega*, 363 F.3d 1093, 1095 (11th Cir. 2004) (emphasis added). Here, Mrs. Chafin may choose to "re-enter this country on [her] own" with E.C. *Villamonte-Marquez*, 462 U.S. at 581 n.2. While that may seem unlikely right now, it is not impossible; and that possibility, no matter how speculative, saves this case from mootness.

Even if Mrs. Chafin and E.C. might not return to the United States voluntarily or involuntarily, that eventuality is not certain now and thus does not moot this case. Cases involving fugitives, where enforcement is contingent upon capturing them, are not considered moot and are decided on the merits. "[R]espondents' fugitive status does not render [a] case moot." *United States* v. *Sharpe*, 470 U.S. 675, 681 n.2 (1985); *see also United States* v. *Montez-Gaviria*, 163 F.3d 697, 700 (2d Cir. 1998) (finding appeal justiciable even though it "may well turn out that [the defendant] never returns to this country and so never actually has to serve out the sentence that he challenges on appeal").

The mootness test does not require a minimum threshold of probability, but allows a case to proceed if there is any possibility of relief, including the possibility that a litigant will return to the United States voluntarily or involuntarily. Analogously, courts may

enter default judgments against absent parties so long as there is jurisdiction and proper service of process. *See* FED. R. CIV. P. 55. As in all of these situations, the physical absence of parties from the jurisdiction does not make this case moot.

3. Whether or Not the District Court Could Enforce Its Own Ruling, the Case Is Not Moot Because It Could Influence Other Proceedings

The possibility that a judgment may be difficult or even impossible to enforce does not render a case moot, as long as a judgment on the merits may influence future litigation. *See, e.g.*, *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 578 (1987) (finding federal lawsuit not moot despite expiration of contested mineral lease because resolution could affect future state-court action for land restoration). Even though one court would not itself award the ultimate relief sought, its judgment could serve as a predicate to relief in a different forum.

In particular, a case is not moot if a second court would enforce or defer to the first court's order. The departure of criminal defendants from the United States, for example, does not moot their cases, because of the "possibility that [the defendants] could be extradited and imprisoned for their crimes." *Villamonte-Marquez*, 462 U.S. at 581 n.2. But the effect on future proceedings need not be so direct. "'The prospect that a judgment will affect future litigation or administrative

action'" suffices to defeat mootness. *ConnectU LLC* v. *Zuckerberg*, 522 F.3d 82, 89 (1st Cir. 2008) (quoting 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.3, at 291 (2d ed. 1984)). Thus, the possibility that a federal action will toll the statute of limitations in a state forum that is hearing a related case suffices to defeat mootness. *Id.*

The same is true when a federal appellate court reverses a federal judgment enjoining state litigation, thus allowing a state suit to proceed. This Court has overturned just such an anti-suit injunction, allowing state proceedings to move forward. *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 142-45, 151 (1988). In the same vein, this Court has twice reversed district court orders enjoining enforcement of state court judgments. *Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. 1, 6-9 (1987); *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 626, 643 (1977) (plurality opinion); *id.* at 645 (Blackmun, J., concurring). Because a federal appellate reversal opens the door to relief in another forum, these cases are not moot.

In short, even if the original court must rely on another court to provide ultimate relief, the case is not moot so long as the first court can make relief more likely. As the next two sections discuss, relief via a second court is particularly relevant here, where it is not only possible but probable that Scottish or Alabama state courts would defer in whole or in part to a federal district court's order.

B. Reversal of the District Court's Order Would Allow the Alabama Custody Action to Proceed

Adverse Hague Convention judgments continue to have preclusive effect in state custody proceedings, such as the Chafins' custody case in Alabama. The federal court's judgment of wrongful removal caused the Alabama courts to abstain and let the Scottish courts determine custody. Once a court in country A has "receiv[ed] notice of a wrongful removal or retention of a child" as adjudicated in response to a Hague Convention petition, country A's courts ordinarily "shall not decide on the merits of rights of custody." Hague Convention art. 16, App. 10a. As the Pérez-Vera Report underscores, "the competent authorities in [country A] are forbidden to adjudicate on the matter when they have been informed that the child in question has been, in terms of the Convention, wrongfully removed or retained." *Pérez-Vera Report* at 463.

The procedural history of this case illustrates how adverse federal judgments act as red traffic lights, staying state custody proceedings. Mrs. Chafin's Alabama counsel specifically pleaded the federal district court judgment as a reason to dismiss the state custody proceeding. The trial court and Alabama Court of Civil Appeals agreed, dismissing the state custody suit in favor of Scottish custody proceedings. *Chafin* (Alabama) at *1. The latter court expressly ruled that "the federal district court's determination that the child's residence was in Scotland and that

the child was not a resident of Alabama" deprived the Alabama state court of subject-matter jurisdiction. *Id.* at *4. Thus, the federal judgment regarding E.C.'s habitual residence required the Alabama state court to stay or dismiss its proceeding and defer to the later-filed Scottish proceeding.

That deference is in keeping with the UCCJEA, which the Alabama Court of Civil Appeals cited as requiring Alabama's courts to defer to the Scottish proceedings. *Chafin* (Alabama) at *4. The UCCJEA, adopted by forty-nine U.S. states plus the District of Columbia, seeks to resolve inter-jurisdictional custody disputes efficiently.[7] The similar federal Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A [hereinafter PKPA], further binds states to these commitments.

Under the UCCJEA, the courts of one state must "recognize and enforce a child-custody determination of a court" in another state that had jurisdiction. UCCJEA § 303; *see also id.* § 313 (requiring courts to accord full faith and credit to other states' orders); 28 U.S.C. § 1738A(a). A state court may also enforce a Hague Convention return order "as if it were a child-custody determination." UCCJEA § 302. Barring any fundamental-human-rights violation, foreign

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[7] UCCJEA § 112 cmt.; *Legislative Fact Sheet – Child Custody Jurisdiction and Enforcement Act*, UNIF. LAW COMM'N, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act (last visited Sept. 21, 2012).

child-custody determinations "*must* be recognized and enforced." *Id.* § 105(b)-(c).

But, before a court can determine child custody, it must first determine whether it has jurisdiction under the UCCJEA and PKPA. *Ex parte D.B.*, 975 So. 2d 940, 942 (Ala. 2007). A court has jurisdiction only if it is in the child's "home state," where the "child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child-custody proceeding." UCCJEA §§ 201(a)(1), 102(7). Thus, Alabama courts will decline jurisdiction where another state is the home state and "an enforceable custody determination" might "yet emerge[ ] from [the home state's] proceedings." *Ex parte D.B.*, 975 So. 2d at 956.[8]

Reversing the federal district court's judgment would remove this bar to subject-matter jurisdiction. It would give the Alabama courts the green light for the custody suit to proceed there.

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[8] Even where an Alabama court has jurisdiction under the UCCJEA, it "may decline to exercise jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum." ALA. CODE § 30-3B-207 (1975). The issue of *forum non conveniens* may be raised at another court's request. *Id.* The federal district court's judgment can thus serve as a request to defer to another country's proceedings.

C. Reversal of the District Court's Order Would Likely Influence Proceedings in Scotland

When a party claims mootness based on its own action, its "burden" of proving that relief is impossible "is a heavy one." *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *accord Cnty. of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979); *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 190 (2000) ("formidable burden"). To prove that she has mooted this case by her act of removing E.C. from the United States, Mrs. Chafin must prove not only that a reversal of the district court's judgment (1) would leave the courts below powerless to provide relief to Sergeant Chafin and (2) would have no effect on the Alabama proceeding, but also that it (3) would have no impact on the Scottish court proceedings on the same matter.

In fact, the opposite is true. Scotland's common-law and statutory practices of deferring to foreign judgments in general, and parental-rights orders in particular, demonstrate that Scottish courts would recognize or at least defer to foreign Hague Convention judgments. Because a favorable U.S. federal judgment would have these effects in Scottish courts, this case is not moot.

1. Scottish Courts Recognize and Defer to Other Countries' Judgments Relating to Parental Rights

By statute, Scottish courts accord comity and recognition to other countries' judgments relating to parental rights. The Family Law Act of 1986 provides: "An order relating to parental responsibilities or parental rights in relation to a child which is made outside the United Kingdom *shall be recognised in Scotland* if the order was made in the country where the child was habitually resident." Family Law Act, 1986, c. 55, § 26(1) (U.K.) (as amended) (emphasis added).

This rule reaches far beyond final custody rulings. Scottish courts must also defer to preliminary or pending proceedings. Thus, when a Scottish court determines that the Hague Convention applies, it will return a child to the jurisdiction of a U.S. court where proceedings are already pending and defer to the U.S. court's rulings. *See TLMP* v. *AWP*, [2012] CSOH 121 [4, 9, 13, 88], 2012 WL 2922776 (Scot.), *available at* http://www.scotcourts.gov.uk/opinions/2012CSOH121.html. Similarly, Scottish courts will entertain a plea of *forum non conveniens* in order to avoid interfering with threatened or pending custody proceedings in another court with jurisdiction. *See, e.g.*, *Calleja* v. *Calleja*, (1996) S.C. 479, 483 (Scot.). That would be

the situation here if the court of appeals reversed the district court."

The Family Law Act codifies a long history of Scottish courts' deference to foreign courts' parental-rights decisions. When confronted with a Danish divorce decree and custody decision, for instance, the Court of Session explained that Scottish courts "may be called on to assist to make the decree of a foreign Court effectual against a party resident in [Scotland]." *Westergaard* v. *Westergaard*, (1914) S.C. 977, 980 (Scot.). The court refused to reconsider the merits of the Danish decrees, stating that it had "no power to review or alter what has been judicially done in Denmark" but could only "aid the enforcement of the foreign decree." *Id.* The Scottish court could not "set . . . aside" the Danish decree "or authorise any one who is under its order to act contrary to it." *Id.* As long as a Danish court could still alter the judgment, "the Danish tribunal would be the proper place in which to apply for an order altering it." *Id.*[10]

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[9] Even before the Family Law Act, Scottish courts abstained in order to allow a pending case to proceed in a foreign court. *In re Thompson, Pet'r.* (1980) S.L.T. (Notes) 29 (Scot.).

[10] Following *Westergaard*, the Scottish Outer House recognized a Dutch custody decision, making it "valid in Scotland" and thus requiring a transfer of the child to the prevailing parent in the Dutch case. *Kelly* v. *Marks*, (1974) S.L.T. 118, 124 (Scot.). While "comity does not demand enforcement of a foreign custody decree" where it "would injure the child," Scottish courts must accord foreign custody determinations "grave consideration." *Id.* at 123.

Moreover, a report on family law prepared by the Law Commission and Scottish Law Commission explains that in Scotland, "external custody decrees pronounced by the courts of the domicile are entitled to recognition in Scotland" and that the holder of the custody order may "enforce his rights in Scotland [by] apply[ing] immediately for an order for delivery, just as if he held a Scottish custody order." LAW COMM'N & SCOT. LAW COMM'N, FAMILY LAW: CUSTODY OF CHILDREN – JURISDICTION AND ENFORCEMENT WITHIN THE UNITED KINGDOM 37.[11] Though enforcement is not automatic, "[a] previous order, made by a court with a recognised jurisdiction, will be treated with respect, particularly if it is recent and was arrived at after a full examination of the facts." *Id.*; *e.g.*, *Campbell* v. *Campbell*, (1977) S.C. 103, 107 (Scot.) (deferring to Texas custody judgment and declining to rehear issue de novo); *Lyndon* v. *Lyndon*, (1978) S.L.T. (Notes) 7 (Scot.).[12]

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[11] While the Report focuses on the effect of custody decisions rendered elsewhere in the United Kingdom, it also addresses "the recognition and enforcement of custody and similar orders made outside the British Isles" and draws on cases involving custody decrees from outside the United Kingdom. *See* FAMILY LAW: CUSTODY OF CHILDREN at 1, 37 n.261.

[12] These habits of enforcement in cases involving parental rights mirror the United Kingdom's practice of reciprocal enforcement more generally. Sometimes, the courts of the United Kingdom recognize and enforce the judgments of foreign courts as a matter of comity, even where no treaty or statute requires it. *See Hilton* v. *Guyot*, 159 U.S. 113, 164 (1895). In the United Kingdom, "the broad principle of recognition and enforcement

(Continued on following page)

2. Deference to Foreign Judgments Relating to Parental Rights Furthers the Convention's Goal of Promoting Cooperation Among Contracting States

The Scottish practice of deference and routine enforcement, especially in matters relating to child custody, is in keeping with the Hague Convention. As a preliminary matter, many cases governed by the Convention never require judicial resolution, as the respondents in many Convention return petitions voluntarily return children without requiring court enforcement. NIGEL LOWE, HAGUE CONFERENCE ON PRIVATE INT'L LAW, A STATISTICAL ANALYSIS OF APPLICATIONS MADE IN 2008 UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, PT. I – GLOBAL REPORT 6 (2011) (19% of respondents).

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for foreign judgments" developed from a matter of comity into "the doctrine of obligation." *Eliades* v. *Lewis*, [2003] EWCA Civ. 1758 [49], [2004] 1 C.L.C. 556, 570 (2003) (Eng.). Common law principles provide for recognizing and enforcing foreign judgments even apart from any specific treaty or statute. *See, e.g.*, *Starlight Int'l Inc.* v. *Bruce*, [2002] EWHC (Ch.) 374 [11, 13, 46], [2002] I.L. Pr. 35 (Eng.) (enforcing default judgment entered by U.S. District Court). Scottish courts thus enforce U.S. judgments because, as the House of Lords has held, "[t]he judgment and orders of the competent American courts are final." *Clarke* v. *Fennoscandia Ltd.* (No. 3), [2007] UKHL 56 [32], (2008) S.C.(H.L.) 122, 130 (Scot.) (upholding enforcement of Delaware and Colorado state-court judgments in Scotland).

When court enforcement is necessary, it is usually uncontroversial. Though the Convention does not expressly require signatories' courts to enforce one another's decisions concerning parental rights, in practice these courts do so. The Convention is "centered upon the idea of cooperation amongst authorities" and stresses the "concept of reciprocity." *Pérez-Vera Report* at 435. Deference to foreign Hague Convention adjudications "is consistent with the Convention drafters' primary concern with securing international cooperation regarding the return of children wrongfully taken by a parent from one country to another." *Avesta* v. *Petrousas*, 580 F.3d 1000, 1011 (9th Cir. 2009) (internal quotation marks omitted). Comity "is at the heart of the Convention." *Blondin* v. *Dubois*, 189 F.3d 240, 248 (2d Cir. 1999).

Thus, even where no statute requires automatic enforcement, in practice signatories' courts respect one another's Hague Convention rulings and judgments. For example, *Diorinou* v. *Mezitis* afforded "considerable deference" to a Greek court's decision even though ICARA does not require U.S. courts to afford full faith and credit to another nation's Hague Convention application. 237 F.3d 133, 142, 145 (2d Cir. 2001). While the Second Circuit questioned the soundness of a Greek court's decision under the Convention, it cited the "deference normally comprehended by the concept of international comity." *Id.* at 143, 145. Thus, it affirmed the district court's order requiring a father to return his children from the United States to Greece. *Id.* at 135.

Hague Convention enforcement is routine in foreign countries as well. The vast majority of the eighty-eight signatories appear to comply with their obligations to return children. Only three were found noncompliant with the Convention, five had some patterns of noncompliance, and four more had individual cases of noncompliance. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, INTERNATIONAL PARENTAL CHILD ABDUCTION: REPORT OF COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 3-6, 9 (2012). The report nowhere lists the United Kingdom, indicating no known enforcement problems. In Scotland in particular, "enforcement is not an issue because return orders are normally complied with." A COMPARATIVE LEGAL STUDY at 14 & n.20.

3. A Successful Appeal Would Likely Influence the Scottish Proceedings

1. Because Scottish courts defer to U.S. judgments, reversal of the district court's order in this case would influence the Scottish proceedings. In granting Mrs. Chafin's Hague Convention petition, the U.S. district court necessarily found that E.C.'s habitual residence was in Scotland, that returning her to Scotland would pose no grave risk of harm, and thus that Sergeant Chafin was wrongfully retaining her in breach of Mrs. Chafin's rights of custody under Scottish law. Pet. App. 4-12; Hague Convention arts. 3(a), 13, App. 2a, 8a.

On appeal, Sergeant Chafin sought to challenge the district court's findings of habitual residence, no grave risk of harm, and thus wrongful retention of E.C. Br. of Resp't-Appellant at 27-40, *Chafin* v. *Chafin*, No. 11-15355 (11th Cir. filed Feb. 6, 2012). If the Eleventh Circuit had reached the merits and reversed, on remand the district court could have (and probably would have) entered judgment for Sergeant Chafin.

2. A U.S. judgment denying Mrs. Chafin's petition, after an appellate reversal, would be recognized and given deference by the Scottish courts. It would halt the Scottish custody proceedings, allowing the Alabama state case to proceed. Under Scottish law of res judicata (which encompasses what would be issue preclusion under U.S. law), Scottish courts "will not tolerate that the same issue should be litigated repeatedly between the same parties on substantially the same basis." *Grahame* v. *Sec'y of State for Scotland*, (1951) S.C. 368, 387 (Scot.). Having previously litigated these issues against Mrs. Chafin in U.S. federal court, Sergeant Chafin could plead res judicata in Scotland. *See Primary Health Care Centres (Broadford) Ltd.* v. *Ravangave*, [2009] CSOH 46 [21, 23]; (2009) S.L.T. 673 (Scot.), *available at* http://www.scotcourts.gov.uk/opinions/2009CSOH46.html.

Sergeant Chafin's plea of res judicata would succeed, as a U.K. case illustrates. In a custody dispute between a U.S. and a U.K. parent, a U.K. court halted its proceedings in favor of an anticipated Hague Convention ruling on wrongful removal by a

U.S. court. As the High Court of Justice reasoned, it is "a general principle of some importance [that] when the wrongfulness of a removal has become res judicata in the requesting country, it binds the courts of the addressed country so as to make the issue of wrongful removal res judicata in the courts of both the requesting and the requested state." *Re: Bates (A Minor)*, No. CA 122/89, 1989 WL 1683783 (High Ct. J., Fam. Div. Feb. 23, 1989) (Eng.).

Currently, the federal judgment and findings give the Scottish courts the green light to proceed. But a judgment denying Mrs. Chafin's petition would operate as a red light, causing the Scottish court to deny Mrs. Chafin custody or to stay its proceedings in favor of the Alabama proceedings. That is particularly true in light of Scottish family law's stated preference for preserving the status quo ante. *See Brixey* v. *Lynas* (No. 1), (1997) S.C.(H.L.) 1, 3 (Scot.). Once a favorable judgment preclusively established that E.C. was habitually resident in the United States, § 26(1) of the Family Law Act of 1986 would require the Scottish court to recognize an Alabama custody judgment.

Mrs. Chafin's Scottish pleadings underscore the bearing of the U.S. findings on the Scottish case. In the Scottish proceedings, Mrs. Chafin repeatedly averred the U.S. district court's finding that E.C.'s retention in the United States was wrongful and its judgment that Mrs. Chafin could remove her to Scotland to begin custody proceedings there. Initial Writ, Condescendence ¶¶ 2, 11. Mrs. Chafin's solicitors (lawyers) would not have pleaded those Hague

Convention findings and judgment unless they thought they were material to the Scottish custody proceedings. If, however, Sergeant Chafin prevailed on his federal appeal and remand, his Scottish lawyers would then plead that judgment and those facts as reasons not to grant Mrs. Chafin custody.

3. A favorable judgment would empower Sergeant Chafin not only to block Mrs. Chafin's Scottish custody petition, but also to petition affirmatively for the return of his daughter. At the time of the appeal, the district court's adverse judgment under the Hague Convention impeded his ability to file and prevail on his own Hague Convention petition in Scotland. A reversal of that adverse judgment, however, would remove that impediment. Sergeant Chafin could thereafter file his own Hague Convention petition in Scotland, seeking E.C.'s return to the United States on the ground that her habitual residence was there. In doing so, he would plead the district court's new judgment of no wrongful removal, as well as its predicate finding of habitual residence, to collaterally estop Mrs. Chafin. As a result, the Scottish court would likely order E.C.'s return to the United States to let the Alabama custody suit proceed.

An affirmative Hague Convention suit would allege that Mrs. Chafin had wrongfully removed E.C. from the United States. It is no obstacle that Mrs. Chafin did so pursuant to the district court's order, as "wrongful" is a defined term of art under the Convention. A removal is wrongful whenever it is "in breach of rights of custody . . . under the law of the State in which the child was habitually resident immediately

before the removal," as long as those rights were actually being exercised or would have been exercised. Hague Convention art. 3, App. 2a. If, on remand from an appellate reversal, the district court determined that E.C. habitually resided in the United States, then Sergeant Chafin's U.S. custody rights would govern, which Mrs. Chafin breached by taking and keeping E.C. out of the country.

D. The Possibility of a Stay Pending Appeal Is Immaterial to Mootness

In response to the certiorari petition, Mrs. Chafin argued that courts can stay return orders, so this Court should not hesitate to deem cases moot when they are not stayed. Opp. 10. That argument is doubly flawed.

First, a party need not procure a stay on pain of having his case considered moot. This Court unanimously rejected that argument two Terms ago. In *Turner* v. *Rogers*, respondents argued vigorously that the case was moot because petitioner had failed to seek a stay pending appeal, even though South Carolina courts generally issue stays in such circumstances. Br. of Resp'ts at 23-25, *Turner* v. *Rogers*, 131 S. Ct. 2507 (2011) (No. 10-10). They claimed that there was a "requirement of seeking a stay" in order to prevent mootness. *Id.* at 24. Nevertheless, all nine Justices rejected that argument; none considered the case moot. *Turner*, 131 S. Ct. at 2515; *id.* at 2521 n.1 (Thomas, J., dissenting). The failure to procure a stay

thus does not make a case moot. *Cf. Villamonte-Marquez*, 462 U.S. at 581 n.2 (holding that a party's failure to obtain a stay was irrelevant to mootness because the issue is whether a reversal would have some effect).[13]

Second, even if the failure to seek a stay were sometimes relevant, it would matter only in cases where the court could *and would* have granted a stay. *Turner*, 131 S. Ct. at 2515 (majority opinion). Stays are neither always available nor always granted. In this case, Sergeant Chafin tried in vain to obtain a stay. Within twenty minutes of the district court's oral ruling, Sergeant Chafin petitioned the court for a stay. The district court denied that petition just sixteen minutes later. Pet. 7; Pet. App. 13-14; Opp. 4-5. A few hours later, before Sergeant Chafin could move the court of appeals for a stay, Mrs. Chafin left the country with E.C. in tow. Despite Sergeant Chafin's prompt effort to protect his rights, once the

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[13] When courts consider at all the reason that circumstances have changed, they do so only insofar as that reason bears on the future likelihood of recurrence. Thus, courts strongly presume that "voluntary cessation of a challenged practice" does not moot a case unless "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189 (internal quotation marks omitted). Any other rule would let parties feign cessation strategically, to moot pending litigation, until they succeeded in securing dismissals. Here, the lack of a stay is unrelated to whether Sergeant Chafin continues to suffer the deprivation of his daughter and whether a favorable ruling by the Eleventh Circuit might help to remedy that deprivation.

district court had denied his motion, he had no practical way to prevent his daughter from leaving the country. Because there was "no procedure of which [Sergeant Chafin] could have availed himself" before execution of judgment, the absence of a stay has no bearing on whether this case is moot. *Sibron*, 392 U.S. at 53 n.13.

III. Prudential Considerations Favor Allowing Appeals of Hague Convention Rulings to Proceed

Mootness doctrine takes into account prudential considerations. *Friends of the Earth*, 528 U.S. at 191-92 (citing with approval *Honig* v. *Doe*, 484 U.S. 305, 329-32 (1988) (Rehnquist, C.J., concurring)); *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 404 n.11 (1980) (characterizing mootness inquiry as "flexible" and "look[ing] to practicalities and prudential considerations") (internal quotation marks omitted).

Here, the purposes and policies of the Hague Convention and ICARA, sister signatories' case law, and litigants' access to justice in the federal courts all support Sergeant Chafin's position: Appeals of Hague Convention return orders are not mooted by one party's interruption of the proceedings by taking the child to another country.

1. The Hague Convention's purpose is to preserve or restore the status quo ante. It deters child removal by erasing an incentive to do so. A parent's strategic, unilateral removal of a child no longer

dictates the courts and laws that will ultimately determine custody. *See supra* p.4. By deterring child removal, it preserves and stabilizes children's lives in their established homes and communities. Conversely, denying U.S. jurisdiction over children once they leave our shores would encourage child removal and instability.

Absent the Hague Convention, a parent could take a child to any other country in an attempt to obtain a better outcome in the custody proceeding. Allowing departure from the United States to moot a pending or imminent appeal would create much the same problem: It would let the parent who prevailed in the district court leave before an appellate court could review and possibly reverse the judgment. It would let foreign parents curtail U.S. parents' rights to appeal, while having no effect on cases in which the U.S. parent prevailed in the first instance.

A party may not unilaterally insulate a favorable decision from review by acting strategically. That concern explains this Court's great reluctance to allow a party's voluntary cessation of challenged activity to moot a case. *E.g.*, *Friends of the Earth*, 528 U.S. at 189. But the decision below exacerbates this danger.

2. Appeals are important to ensuring justice. A plurality of this Court, albeit in the criminal context, has "recogniz[ed] the importance of appellate review to a correct adjudication," particularly because appellate courts reverse "a substantial proportion" of cases. *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956) (Black, J., plurality opinion).

Moreover, appeals are entirely consistent with, and indeed are contemplated by, the Hague Convention's scheme. As discussed, the Hague Convention envisioned that return orders would be subject to appeal. Almost all jurisdictions allow appeals. *Supra* p.6. The Guide to Good Practice recognizes that the appeals process may take time and that some countries deal with this problem by making return orders effective immediately if appeals will take a while. *Supra* pp.5-6. And, in enacting ICARA, Congress envisioned that litigants would remain able to pursue appeals. *See supra* pp.6-8.

Appeals are also consistent with the UCCJEA, a U.S. uniform statute that parallels the Hague Convention. The UCCJEA explicitly preserves the right to appeal, even while it values "quick enforcement." UCCJEA § 314 & cmt. As discussed, under the UCCJEA, U.S. courts routinely enforce one another's custody orders, deferring to the state (or foreign country) of habitual residence. *Supra* p.31. While the Hague Convention does not address the matters covered by the UCCJEA, it makes sense to follow the same approach. The initial court with Hague Convention jurisdiction should retain primacy, complete its appellate process, and correctly determine habitual residence. That approach is most efficient, serving as a traffic signal to ensure that only one court proceeds to determine custody while others await its final determination.

In addition, appeals keep a single district court's error from warping the status quo. As the Pérez-Vera

Report stresses, a child's speedy return "must not prejudge the merits of custody rights." *Pérez-Vera Report* at 53. Allowing a Hague Convention order to keep a five-year-old girl in Scotland for more than a year skews the best-interests-of-the-child analysis, and could lead a Scottish court to determine that returning E.C. to the United States later would be too disruptive. Speedy appeals are the antidote, minimizing the distorting effect of an erroneous district court's ruling.

By contrast, the decision below lops off appeals whenever a district court rules for the foreign parent and does not stay its judgment. Under the Eleventh Circuit's view, one litigant has the power to prevent review of a single district judge's possibly erroneous findings of fact and conclusions of law. As a result, foreign courts may defer to, or even grant preclusive effect to, findings and judgments that have not withstood a single appeal. Whenever they denied stays, district courts would effectively insulate their rulings from appeal.

3. There is no good reason to encourage child removal and truncate appeals. The subject matter is not trivial. It is about children like E.C., a five-year-old girl and a U.S. and U.K. citizen, who lived with her father in the U.S. continually for at least a year and eight months until the district court let her mother take her away. Children in E.C.'s position are often U.S. citizens if not also habitual residents of the United States, but the decision below precludes any appellate review to determine their U.S. residency.

This is a concrete injustice, harming real families, produced by erroneous rulings that can still be fixed.

4. Allowing appeals to proceed is consistent with the case law of other Convention signatories. "In interpreting any treaty, [t]he opinions of our sister signatories . . . are entitled to considerable weight. The principle applies with special force here, for Congress has directed that 'uniform international interpretation of the [Hague] Convention' is part of the Convention's framework." *Abbott*, 130 S. Ct. at 1993 (quoting 42 U.S.C. § 11601(b)(3)(B)) (citations and internal quotation marks omitted).

At least two sister signatories' courts have held that enforcement of a return order does *not* moot an appeal from that order. Spain's *Tribunal Constitucional* considered the exact question presented here on similar facts. S.T.C. 120/2002, May 20, 2002 (B.O.E. No. 11895, p. 47) (Spain) (re: Malgorzata Kolarz and Pawel Lucjan Kolarz). A father instituted return proceedings in Spain under the Hague Convention, and the Spanish trial court ordered the child returned. *Id.* at 47. The order was not stayed, and the father returned to Poland with the child. *Id.* On appeal, a Spanish provincial court dismissed the appeal as moot. *Id.* at 47-48. On further appeal, Spain's *Tribunal Constitucional* vacated and remanded the case to the provincial court, ordering it to hear the appeal. It reasoned that even if returning the child might be difficult, it would not be impossible, and a judgment of a Spanish court might influence the

proceedings in Poland. *Id.* at 50, 52. A Portuguese court has come to a similar conclusion.[14]

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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[14] *See* DIRECTORATE OF LEGAL RESEARCH, LAW LIBRARY OF CONGRESS, HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION: AN ANALYSIS OF THE APPLICABLE LAW AND INSTITUTIONAL FRAMEWORK OF FIFTY-ONE JURISDICTIONS AND THE EUROPEAN UNION 291 & n.28 (2004), *available at* http://www.fosterquan.com/content/documents/policy_papers/LibraryofCongressCountrybyCountryAnalysisOnIntlChildAbduction.pdf (citing *Ac. Rel. Lisboa of May 02, 1989*, No. 0002087, Rel. Herlander Martins (Port.) as a case in which a right to appeal was granted in Portugal, notwithstanding the child's return to Canada).

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HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

(Concluded 25 October 1980)

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation

of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where –

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention –

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II – CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organisations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent

authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

a) to discover the whereabouts of a child who has been wrongfully removed or retained;

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d) to exchange, where desirable, information relating to the social background of the child;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III – RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain –

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b) where available, the date of birth of the child;

c) the grounds on which the applicant's claim for return of the child is based;

d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

e) an authenticated copy of any relevant decision or agreement;

f) a certificate or an affidavit emanating from a Central Authority, or other competent authority

of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State,

on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has

been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV – RIGHTS OF ACCESS

Article 21

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V – GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalisation or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be

entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may,

where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorisation empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial

or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units –

a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to

different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI – FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the

Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this

Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force –

(1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of

its instrument of ratification, acceptance, approval or accession;

(2) for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the

Conference, and the States which have acceded in accordance with Article 38, of the following –

(1) the signatures and ratifications, acceptances and approvals referred to in Article 37;

(2) the accessions referred to in Article 38;

(3) the date on which the Convention enters into force in accordance with Article 43;

(4) the extensions referred to in Article 39;

(5) the declarations referred to in Articles 38 and 40;

(6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

(7) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

International Child Abduction Remedies Act (ICARA)

Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified as amended at 42 U.S.C. §§ 11601-11611)

§11601. Findings and declarations

(a) Findings

The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their well-being.

(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children

and will deter such wrongful removals and retentions.

(b) Declarations

The Congress makes the following declarations:

(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this chapter the Congress recognizes –

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

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§11602. Definitions

For the purposes of this chapter –

(1) the term "applicant" means any person who, pursuant to the Convention, files an application with the United States Central Authority or a Central

Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention;

(2) the term "Convention" means the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980;

(3) the term "Parent Locator Service" means the service established by the Secretary of Health and Human Services under section 653 of this title;

(4) the term "petitioner" means any person who, in accordance with this chapter, files a petition in court seeking relief under the Convention;

(5) the term "person" includes any individual, institution, or other legal entity or body;

(6) the term "respondent" means any person against whose interests a petition is filed in court, in accordance with this chapter, which seeks relief under the Convention;

(7) the term "rights of access" means visitation rights;

(8) the term "State" means any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term "United States Central Authority" means the agency of the Federal Government designated by the President under section 11606(a) of this title.

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§11603. Judicial remedies

(a) Jurisdiction of courts

The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petitions

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) Notice

Notice of an action brought under subsection (b) of this section shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) Determination of case

The court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention.

(e) Burdens of proof

(1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence –

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing –

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) Application of Convention

For purposes of any action brought under this chapter –

(1) the term "authorities", as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies;

(2) the terms "wrongful removal or retention" and "wrongfully removed or retained", as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and

(3) the term "commencement of proceedings", as used in article 12 of the Convention, means, with respect to the return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) Full faith and credit

Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter.

(h) Remedies under Convention not exclusive

The remedies established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements.

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§11604. Provisional remedies

(a) Authority of courts

In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 11603(b) of this title may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition.

(b) Limitation on authority

No court exercising jurisdiction of an action brought under section 11603(b) of this title may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

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§11605. Admissibility of documents

With respect to any application to the United States Central Authority, or any petition to a court under section 11603 of this title, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document,

or information shall be required in order for the application, petition, document, or information to be admissible in court.

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§11606. United States Central Authority

(a) Designation

The President shall designate a Federal agency to serve as the Central Authority for the United States under the Convention.

(b) Functions

The functions of the United States Central Authority are those ascribed to the Central Authority by the Convention and this chapter.

(c) Regulatory authority

The United States Central Authority is authorized to issue such regulations as may be necessary to carry out its functions under the Convention and this chapter.

(d) Obtaining information from Parent Locator Service

The United States Central Authority may, to the extent authorized by the Social Security Act [42 U.S.C. 301 et seq.], obtain information from the Parent Locator Service.

(e) Grant authority

The United States Central Authority is authorized to make grants to, or enter into contracts or agreements with, any individual, corporation, other Federal, State, or local agency, or private entity or organization in the United States for purposes of accomplishing its responsibilities under the Convention and this chapter.

(f) Limited liability of private entities acting under the direction of the United States Central Authority

(1) Limitation on liability

Except as provided in paragraphs (2) and (3), a private entity or organization that receives a grant from or enters into a contract or agreement with the United States Central Authority under subsection (e) of this section for purposes of assisting the United States Central Authority in carrying out its responsibilities and functions under the Convention and this chapter, including any director, officer, employee, or agent of such entity or organization, shall not be liable in any civil action sounding in tort for damages directly related to the performance of such responsibilities and functions as defined by the regulations issued under subsection (c) of this section that are in effect on October 1, 2004.

(2) Exception for intentional, reckless, or other misconduct

The limitation on liability under paragraph (1) shall not apply in any action in which the plaintiff proves that the private entity, organization, officer, employee, or agent described in paragraph (1), as the case may be, engaged in intentional misconduct or acted, or failed to act, with actual malice, with reckless disregard to a substantial risk of causing injury without legal justification, or for a purpose unrelated to the performance of responsibilities or functions under this chapter.

(3) Exception for ordinary business activities

The limitation on liability under paragraph (1) shall not apply to any alleged act or omission related to an ordinary business activity, such as an activity involving general administration or operations, the use of motor vehicles, or personnel management.

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§11607. Costs and fees

(a) Administrative costs

No department, agency, or instrumentality of the Federal Government or of any State or local government may impose on an applicant any fee in relation to the administrative processing of applications submitted under the Convention.

(b) Costs incurred in civil actions

(1) Petitioners may be required to bear the costs of legal counsel or advisors, court costs incurred in connection with their petitions, and travel costs for the return of the child involved and any accompanying persons, except as provided in paragraphs (2) and (3).

(2) Subject to paragraph (3), legal fees or court costs incurred in connection with an action brought under section 11603 of this title shall be borne by the petitioner unless they are covered by payments from Federal, State, or local legal assistance or other programs.

(3) Any court ordering the return of a child pursuant to an action brought under section 11603 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

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§11608. Collection, maintenance, and dissemination of information

(a) In general

In performing its functions under the Convention, the United States Central Authority may, under such conditions as the Central Authority prescribes by

regulation, but subject to subsection (c) of this section, receive from or transmit to any department, agency, or instrumentality of the Federal Government or of any State or foreign government, and receive from or transmit to any applicant, petitioner, or respondent, information necessary to locate a child or for the purpose of otherwise implementing the Convention with respect to a child, except that the United States Central Authority –

(1) may receive such information from a Federal or State department, agency, or instrumentality only pursuant to applicable Federal and State statutes; and

(2) may transmit any information received under this subsection notwithstanding any provision of law other than this chapter.

(b) Requests for information

Requests for information under this section shall be submitted in such manner and form as the United States Central Authority may prescribe by regulation and shall be accompanied or supported by such documents as the United States Central Authority may require.

(c) Responsibility of government entities

Whenever any department, agency, or instrumentality of the United States or of any State receives a request from the United States Central Authority for information authorized to be provided to such Central Authority under subsection (a) of this section, the

head of such department, agency, or instrumentality shall promptly cause a search to be made of the files and records maintained by such department, agency, or instrumentality in order to determine whether the information requested is contained in any such files or records. If such search discloses the information requested, the head of such department, agency, or instrumentality shall immediately transmit such information to the United States Central Authority, except that any such information the disclosure of which –

(1) would adversely affect the national security interests of the United States or the law enforcement interests of the United States or of any State; or

(2) would be prohibited by section 9 of title 13;

shall not be transmitted to the Central Authority. The head of such department, agency, or instrumentality shall, immediately upon completion of the requested search, notify the Central Authority of the results of the search, and whether an exception set forth in paragraph (1) or (2) applies. In the event that the United States Central Authority receives information and the appropriate Federal or State department, agency, or instrumentality thereafter notifies the Central Authority that an exception set forth in paragraph (1) or (2) applies to that information, the Central Authority may not disclose that information under subsection (a) of this section.

(d) Information available from Parent Locator Service

To the extent that information which the United States Central Authority is authorized to obtain under the provisions of subsection (c) of this section can be obtained through the Parent Locator Service, the United States Central Authority shall first seek to obtain such information from the Parent Locator Service, before requesting such information directly under the provisions of subsection (c) of this section.

(e) Recordkeeping

The United States Central Authority shall maintain appropriate records concerning its activities and the disposition of cases brought to its attention.

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§11608a. Office of Children's Issues

(a) Director requirements

The Secretary of State shall fill the position of Director of the Office of Children's Issues of the Department of State (in this section referred to as the "Office") with an individual of senior rank who can ensure long-term continuity in the management and policy matters of the Office and has a strong background in consular affairs.

(b) Case officer staffing

Effective April 1, 2000, there shall be assigned to the Office of Children's Issues of the Department of State

a sufficient number of case officers to ensure that the average caseload for each officer does not exceed 75.

(c) Embassy contact

The Secretary of State shall designate in each United States diplomatic mission an employee who shall serve as the point of contact for matters relating to international abductions of children by parents. The Director of the Office shall regularly inform the designated employee of children of United States citizens abducted by parents to that country.

(d) Reports to parents

(1) In general

Except as provided in paragraph (2), beginning 6 months after November 29, 1999, and at least once every 6 months thereafter, the Secretary of State shall report to each parent who has requested assistance regarding an abducted child overseas. Each such report shall include information on the current status of the abducted child's case and the efforts by the Department of State to resolve the case.

(2) Exception

The requirement in paragraph (1) shall not apply in a case of an abducted child if –

(A) the case has been closed and the Secretary of State has reported the reason the case was closed to the parent who requested assistance; or

(B) the parent seeking assistance requests that such reports not be provided.

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§11609. Interagency coordinating group

The Secretary of State, the Secretary of Health and Human Services, and the Attorney General shall designate Federal employees and may, from time to time, designate private citizens to serve on an interagency coordinating group to monitor the operation of the Convention and to provide advice on its implementation to the United States Central Authority and other Federal agencies. This group shall meet from time to time at the request of the United States Central Authority. The agency in which the United States Central Authority is located is authorized to reimburse such private citizens for travel and other expenses incurred in participating at meetings of the interagency coordinating group at rates not to exceed those authorized under subchapter I of chapter 57 of title 5 for employees of agencies.

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§11610. Authorization of appropriations

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the purposes of the Convention and this chapter.

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§11611. Report on compliance with the Hague Convention on International Child Abduction

(a) In general

Beginning 6 months after October 21, 1998, and every 12 months thereafter, the Secretary of State shall submit a report to the appropriate congressional committees on the compliance with the provisions of the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, by the signatory countries of the Convention. Each such report shall include the following information:

(1) The number of applications for the return of children submitted by applicants in the United States to the Central Authority for the United States that remain unresolved more than 18 months after the date of filing.

(2) A list of the countries to which children in unresolved applications described in paragraph (1) are alleged to have been abducted, are being wrongfully retained in violation of United States court orders, or which have failed to comply with any of their obligations under such convention with respect to applications for the return of children, access to children, or both, submitted by applicants in the United States.

(3) A list of the countries that have demonstrated a pattern of noncompliance with the obligations of the Convention with respect to applications for the return of children, access to children, or both, submitted by applicants in the

United States to the Central Authority for the United States.

(4) Detailed information on each unresolved case described in paragraph (1) and on actions taken by the Department of State to resolve each such case, including the specific actions taken by the United States chief of mission in the country to which the child is alleged to have been abducted.

(5) Information on efforts by the Department of State to encourage other countries to become signatories of the Convention.

(6) A list of the countries that are parties to the Convention in which, during the reporting period, parents who have been left-behind in the United States have not been able to secure prompt enforcement of a final return or access order under a Hague proceeding, of a United States custody, access, or visitation order, or of an access or visitation order by authorities in the country concerned, due to the absence of a prompt and effective method for enforcement of civil court orders, the absence of a doctrine of comity, or other factors.

(7) A description of the efforts of the Secretary of State to encourage the parties to the Convention to facilitate the work of nongovernmental organizations within their countries that assist parents seeking the return of children under the Convention.

(b) Definition

In this section, the term "Central Authority for the United States" has the meaning given the term in Article 6 of the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980.

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
OCT 29 2012
OFFICE OF THE CLERK

No. 11-1347

In the Supreme Court of the United States

JEFFREY LEE CHAFIN,
Petitioner,

v.

LYNNE HALES CHAFIN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF

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QUESTION PRESENTED

The parties' five-year-old child returned to Scotland with the Respondent, Lynne Hales Chafin (the "Mother") more than a year ago. She did so in compliance with the district court's return order entered under the 1980 Hague Convention on the Civil Aspects of International Child Abduction. Exclusive custody jurisdiction then vested in the Scottish court. There is therefore no longer a case or controversy pending in the United States courts because there is no relief any court of the United States can effect. The only available remedy under the Convention is return. That remedy has been completely executed. The Hague Convention proceedings concluded when the child exited the United States and returned to Scotland pursuant to a valid district court order.

The question presented is:

Is an appeal of a trial court's Hague Convention return order moot upon the child's exit from the United States and return to the requesting State?

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OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unpublished. It is reprinted at Pet. App. 1. The orders of the United States District Court for the Northern District of Alabama are unpublished. They are reprinted at Pet. App. 3 and 13.

JURISDICTIONAL STATEMENT

The court of appeals entered its judgment on February 6, 2012. This Court granted a writ of certiorari on August 13, 2012. This Court has jurisdiction to review the opinion of the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES

United States Constitution, Article III, Section 2

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;-- between a State and Citizens of another State,--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States,

and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

The 1980 Hague Convention on the Civil Aspects of International Child Abduction

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or retention of a child is to be considered wrongful where –

a) it is in breach of rights of custody attributed to a person, an institution, or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own

initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for return of the child.

International Child Abduction Remedies Act, 42 U.S.C. § 11601 *et. seq.*

Section 11601 – Findings and Declarations.

(a) Findings: The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their well-being.

(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

(3) International abductions of children are increasing, and only concerted cooperation pursuant to an international treaty can combat this problem.

(4) The Convention on the Civil Aspects of International Child Abduction, done at the Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of

children and will deter such wrongful removals and retentions.

(b) Declarations: The Congress makes the following declarations:

(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this chapter, the Congress recognizes –

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying custody claim.

STATEMENT OF THE CASE

More than a year ago the parties' five-year-old child returned home to Scotland from Alabama as ordered by the district court. The return was pursuant to the district court's October 12, 2011 oral order, its October

12, 2011 written order, and its October 13, 2011 written opinion and order. Pet. App. 3, 13.

The return order delivered the child home to her habitual residence of Scotland, the requesting State Party. The return order ceded jurisdiction over custody of the child to Scotland – all as provided for and contemplated by the Hague Convention[1]. The Mother and child returned to the Scottish court's custody jurisdiction pursuant to a final order of the federal district court. The Sheriff court in Airdrie proceeded with the case under Scots law.

On May 2, 2011, the Mother instituted her action in the United States District Court for the Northern District of Alabama to secure the return of her daughter to Scotland pursuant to the Hague Convention and the International Child Abduction Remedies Act.[2] JA 1. The child had been wrongfully retained in the United States by the Father. Pet. App. 9. The Mother had requested that the district court rule that the Father had wrongfully retained the parties' daughter in the Northern District of Alabama and that it order the child's return to Scotland with the Mother forthwith. JA 1; Pet. App. 3.

A two-day evidentiary hearing was held on the Mother's Petition on October 11 and 12, 2011. JA 7-8;

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[1] The Convention on the Civil Aspects of International Child Abduction, Done at the Hague, October 25, 1980 T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 (hereinafter the "Hague Convention" or the "Convention").

[2] 42 U.S.C. § 11601 *et seq.* (hereinafter "ICARA").

Pet. App. 3, 13. At the conclusion of the trial, acting in compliance with the Convention, the district court promptly and immediately made its findings of fact and conclusions of law from the bench. (JA 8; Pet. App. 3, 12, 13. The district court issued an oral opinion and order from the bench finding that the Father had indeed wrongfully retained the child in the United States. JA 8; Pet. App. 3, 9, 12, 13. The district court ordered the child to be returned to Scotland with the Mother forthwith. JA 8; Pet. App. 12-14.

Shortly after the lower court had issued its oral opinion and order from the bench, had adjourned the proceedings, and the Mother and her counsel had left the courtroom, the Father's counsel handed the Mother's counsel a Motion to Stay Implementation of Order (the "Motion to Stay"). JA 7; Pet. App. 12, 13. The Motion to Stay requested that the district court "stay implementation and/or enforcement of its Order given this date, pending review by the Eleventh Circuit Court of Appeals." Mot. to Stay Implementation of Order (Oct. 12, 2011) (5:11-CV-01461 Docket Entry No. 29); JA 7.

In his Motion to Stay, the Father only sought a stay of the district court's order requiring the child's return to Scotland pending final resolution of any appeal the Father may file in the Eleventh Circuit Court of Appeals. *Id.* The Father did not seek a temporary stay of the district court's order from the district court or from the court of appeals so that the Eleventh Circuit could rule on a motion to stay filed there if the district court was not inclined to grant the Father's motion to stay. *Id.*

The Mother's counsel returned immediately to the district court to bring the Motion to Stay to the court's attention. The Mother's counsel then properly sought direction from the district court with respect to responding to the Motion to Stay and whether the Mother and child were still permitted to return to Scotland while any Motion to Stay was pending. The Father's counsel was present in the courtroom when the Mother's counsel returned seeking direction from the lower court. In fact, the Motion to Stay had not yet even been filed with the Clerk of the Court. The district court therefore instructed the Father's counsel to file the Motion to Stay in the Clerk's Office so that it would be properly before the district court for consideration.

The district court then considered the Father's Motion to Stay in chambers and issued a written order denying the Motion to Stay. Pet. App. 13-14. The district court further ordered that "[t]he petitioner is permitted to return to Scotland this day with her minor child in accordance with this court's Order." Pet. App. 13.

The district court provided copies of its written order denying the Motion to Stay to counsel immediately after it was signed and entered. *Id.* The Father then failed to request a temporary stay from the district court until the Eleventh Circuit could rule on any motion to stay. He also failed to request a stay from the court of appeals given the district court's denial of the Father's request. JA 7; 19. The Father did not even file a Notice of Appeal until November 14, 2011 – a full month after the child had returned to Scotland. JA 12; 19.

With a copy of the district court's October 12, 2011 order in hand, the Mother and child promptly returned home to Scotland as ordered in the district court's final order. The next day, the district court issued a ten page written order, reducing to writing its findings of fact and conclusions of law that had been pronounced in open court the previous day. Pet. App. 3.

The Mother and child are now home in Scotland and are subject to the ongoing exclusive subject-matter custody jurisdiction of Scots law and the Scottish ne exeat order. Initial Writ, Warrant of Citation, Order Continuing Warrant of Citation, *Hales v. Chafin*, No. F544/11 (Sheriffdom of S. Strathclyde, Dumfries & Galloway at Airdrie Dec. 21, 2011)[3]. They will remain in Scotland and have not left Scotland since their return home. *Id.* Immediately after the Mother and child returned to Scotland, the Mother had initiated custody proceedings in Scotland as contemplated by the Convention. *Id.* She obtained orders from the Scottish court. *Id.* The custody proceedings are pending in the Scottish court and the Father has been provided notice

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[3] In *Mills v. Green*, 159 U.S. 651, 654 (1895), this Court recognized that events rendering appeals moot often may not appear in the record of a case. The Court therefore specifically instructed that "such a [mootness-rendering] fact, when not appearing on the record, may be proved by extrinsic evidence." *Mills*, 159 U.S. at 654. The Sheriff court orders are cited in the briefs filed by both parties and in the *amicus* brief filed by United States in support of the Father, but have not been provided to the Court. The Mother has therefore properly filed along with this merits brief a separate request to lodge copies of the Scottish orders. Pursuant to this Court's instruction in *Mills*, the Scottish court orders are necessary to establish the intervening mooting event of the child's exit from the United States and return to Scotland.

of the Scottish case. *Id*. The Scottish Court has entered a *ne exeat* order prohibiting the removal of the child from Scotland. *Id*. Through its own return order, the United States vested jurisdiction to Scotland. Scotland has taken jurisdiction and proceeded in accordance with the treaty return order. *Id*. All litigation is now with the Sheriff court in Airdrie.

There is no longer any live case or controversy pending in any court in the United States and no relief any court here can effect with respect to the Scottish custody orders and in particular the Scottish *ne exeat* order. *See* Section II, *infra*. The child has returned to Scotland and the parties are engaging in custody litigation there – all pursuant to Article 12 of the treaty. Scots law now exclusively governs this child. The courts of Scotland are the only courts that have ongoing subject-matter jurisdiction to effect relief to either party.

SUMMARY OF ARGUMENT

Upon an Article 12 return order being effected upon the child's exit from the United States, no constitutional justiciable issues exist. By its own actions a United States court has mooted any appeal. There is no constitutional right to appeal and the treaty and implementing legislation repeatedly emphasize prompt return, not long drawn out appeals. To the extent an appeal is deemed appropriate, motions to stay can be allowed. The well-being of the child is the central driving force of the treaty and re-return is therefore not only a legal impossibility but harmful to the child.

ARGUMENT

AN APPEAL OF A TRIAL COURT'S HAGUE CONVENTION RETURN ORDER IS MOOT UPON THE CHILD'S EXIT FROM THE UNITED STATES AND RETURN TO THE REQUESTING STATE.

I. A return under Article 12 is the only available remedy in a Hague Convention case. There is no right or duty to re-return under the Convention.

The only available remedy in a Hague Convention return case is return under Article 12. Convention, art. 12; *see also Abbott v. Abbott*, 130 S.Ct. 1982, 1989 (2010). The Article 12 return is the Hague Convention's "central operating feature." *Id.* Indeed, in return cases it is the Convention's only operating feature.

The sole issue before any court in a Hague Convention return matter is whether the child should be returned to the requesting state from the requested State. The issue before the court is not which parent should care for the child, which parent should be awarded custody of the child, or where the child should ultimately live for the long-term future. Convention, art. 19. These issues are all for the court seised with custody jurisdiction following the Hague Convention decision. The only remedy a court may order – and therefore the only matter at issue before it – is whether to return the child pursuant to Article 12 to the requesting State.

In a return case, the only remedies a court can offer the parties are therefore either (i) an order of return in

favor of the petitioning parent; or (ii) an order declining to return the child in favor of the responding parent. Convention, arts. 12, 19. There are no partial remedies available under the Convention. There is no claw-back provision. There is no right to re-return.

Once the child returns – regardless of whether the return immediately follows the decision of the court of first instance, or follows some form of appellate review – the Hague litigation has concluded. The Hague case must stop there because it has no further force of law. The central operating feature – and the only available remedy in a Convention return case – has been carried out, completed, and cannot be undone. Neither the Convention nor ICARA provide for any further available relief to either party. Neither provide re-returns after the child's Article 12 return. A requested State's court has no authority under the Convention or ICARA to order a re-return on appeal.

The legislative history of ICARA makes clear that "procedures undertaken by the courts under the Convention and [ICARA] are not to determine the merits of the conflicting custody claims that underlie the wrongful abduction or retention, and [ ] such claims remain for resolution after the Convention procedures have been concluded." H.R. REP. 10-525 at 6 (1988). Hague Convention procedures conclude when a child has been returned, at whatever stage of the proceedings, because there are no other available remedies. Convention, arts. 12, 19. A manufactured re-return would undermine the post-return custody claims, improperly interfere with issues that are justiciable only in the requesting State's courts, and turn the Convention on its head.

After a return – which concludes the Convention procedures – the parties' remedies can only lie in the country to which the child has been returned. The location of custody jurisdiction has been decided by the United States court and the appropriate family court must be allowed to proceed without fear of being assailed by contorted comity. There is no further relief a court in the United States can effect. Likewise, if a Hague return request is denied, custody jurisdiction proceeds in the family court jurisdiction of the taking parent. Had the Father prevailed below, custody jurisdiction would have proceeded in Alabama and there is nothing the Scottish courts or Scots law could have done to interfere with Alabama custody subject-matter jurisdiction.

The Hague Convention is first and foremost a jurisdictional treaty. The merits of any underlying custody case are not at issue. Convention, art. 19; *Abbott*, 130 S.Ct. at 1989; *Miller v. Miller*, 240 F.3d 392, 397 (4th Cir. 2001); *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993). The court's role in a Hague Convention case is not to make traditional custody decisions, but to determine in what jurisdiction the child should be physically located so that the proper jurisdiction can make the custody decision. *Loos v. Manuel*, 651 A.2d 1077 (N.J. Super. Ct. Ch. Div. 1994). States Parties to the Convention clearly contemplate, understand, and intend that the jurisdiction to which the child is returned will make all custody determinations with respect to the child upon the child's exit from the requested State. That is exactly what happened here.

The Mother and child returned to Scotland as ordered. The court in Scotland entered custody orders. *See* Warrant of Citation, Order Continuing Warrant of Citation. The courts in Scotland now have exclusive subject-matter custody jurisdiction to decide all matters concerning the child. The United States court ceded jurisdiction to Scotland when it ordered and effected the child's return to Scotland and when no stay was entered by any United States court. There is nothing further at issue in the case before the United States federal courts. The Convention and ICARA do not authorize the United States federal courts to effect any further relief.

The central operating feature – and the only available remedy in return cases under the Convention – was satisfied upon the child's exit from the United States. It cannot be undone. A further United States Hague Convention ruling cannot take back the Scottish court's exclusive custody jurisdiction. Any further United States ruling cannot have any authority in Scots law with respect to custody jurisdiction and the well-being of the child here. *See e.g.* Br. of U.S. at 17, n.3.

II. There is no live case or controversy after the return remedy has been completed and any further proceedings must be dismissed as moot.

Once a child exits the United States pursuant to a return order there is no longer a live case or controversy before the United States courts. Any further decision or opinion of the United States courts could not effect any relief in the matter at issue in the

case before the United States court. The only matter at issue was whether the child should be returned. Once a child exits the United States, there is no longer any subject matter upon which a further judgment of a United States court can operate and be carried into effect, because the only available remedy has been completed. The case is therefore moot and any further opinion of a United States court would be an impermissible advisory opinion.

A. The Constitutional Case-or-Controversy Limitation of the Federal Judicial Power.

Article III of the United States Constitution limits the power of the federal judiciary to "cases" or "controversies." U.S. Const., Art. III, § 2; *see also U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 395-96 (1980).

A court's "lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner v. Jafco*, 375 U.S. 301, 306, n.3 (1964); *see also Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990); *Honig v. Doe*, 484 U.S. at 339 (Scalia, J., dissenting); *Preiser v. Newark*, 422 U.S. 395, 401-04 (1975); *SEC v. Medical Comm. For Human Rights,* 404 U.S. 403 (1972). The doctrine of mootness is therefore a constitutional jurisdictional bar, not a prudential consideration. The distinction is particularly important in this Convention context because the federal judicial power may not extend beyond what is authorized by Article III of the Constitution. Erwin Chemerinsky, *A*

Unified Approach to Justiciability, 22 CONN. L. REV. 677, 692 (1991).

The "case-or-controversy limitation on the federal judicial authority . . . underpins both [the Court's] standing and mootness jurisprudence." *Friends of the Earth Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). "Because the requirement of a continuing case or controversy derives from the Constitution, it may not be ignored when convenient." *Id.* at 213 (Scalia, J. dissenting) (citing *U.S. v. Alaska S.S. Co.* 253 U.S. 113, 116 (1920) (moot question cannot be decided "[h]owever convenient it might be")).

The purpose of the constitutional case-or-controversy limitation on the federal judicial power is to ensure that the business of the federal courts is limited to questions presented "in a form historically viewed as capable of resolution through the judicial process." *Geraghty*, 445 U.S at 396. By judicial process this Court means United States judicial process. There is no judicial process or power here to resolve custody issues there – in Scotland. The Father's remedies now lie in the Sheriff court in Airdrie and the Court of Session[4] in Edinburgh. *See* Initial Writ, Warrant of Citation, Order Continuing Warrant of Citation.

It therefore follows and is well-settled that under Article III, § 2 of the United States Constitution, a

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[4] The Court of Session was established in 1532 by the Act of James V of Scotland. It is both a court of first instance and a court of appeal. It is preserved "in all time coming" in Article XIX of the Treaty of Union between England and Scotland. *See also* Court of Session Act 1830 c. 69.

federal court must not "give opinions upon moot questions or abstract propositions, or [ ] declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green*, 159 U.S. 651, 653 (1895); *see also Church of Scientology v. U.S.*, 506 U.S. 9, 12 (1992).

United States courts may only decide actual controversies "which can be carried into effect." *Mills*, 159 U.S. at 653. The *Mills* Court explained that an appeal must be dismissed as moot when there is no subject matter before the court "upon which a judgment of this court can operate." *Id.* If "an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." *Id.* An Article 12 return is just such an event, it effects everything.

Effect is everything. The *Mills* Court made clear that the key concept to consider in determining whether there is a live case or controversy in a mootness analysis is whether any further decision may actually be carried into effect in the case currently before the court. *Mills*, 159 U.S. at 653. Effect means "to bring about" or "to make happen." Bryan A. Garner, GARNER'S DICTIONARY OF LEGAL USAGE 306 (Oxford University Press, 3rd ed. 2011). By "effect" the *Mills* Court therefore did not mean influence over a decision in future cases between the parties; nor whether some advisory opinion might prove useful or helpful in other matters or other disputes between the parties. The clear *Mills* requirement is actual effect – meaning relief

that can be brought about or made to happen in the parties' case presently before the United States court.

The *Mills* Court provided numerous examples[5], all of which are instructive here, of circumstances requiring dismissal under the mootness doctrine. When the "rights of both parties come under the control of the same persons," for example, an appeal will be dismissed as moot. *Id.* When a tax is paid while a suit concerning the validity of the assessment of the tax is pending, the case will be dismissed as moot. *Id.* When a party seeks to enjoin the incorporation of a village, and the village is in fact incorporated before the conclusion of an appeal, the appeal will be dismissed as moot because "the acts sought to be restrained have been consummated." *Id* at 656-57. So here.

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[5] The *Mills* case itself considered the issue of voting rights. The plaintiff sought to secure the right to vote in an election in South Carolina and had been denied the right he sought. By the time the case reached the appellate courts, the election had already been held. The Court therefore held that the appeal was properly dismissed as moot because no relief in the case before it could be granted. Election cases subsequent to *Mills v. Green* have come up with mixed results as to mootness. *See* Erwin Chemerinsky, FEDERAL JURISDICTION 139-142 (Wolters Kluwer, 6th ed. 2012) and cases cited therein. But the issue of treaty interpretation which gave rise to a finding of mootness by the Eleventh Circuit in the current case does not fit readily into the alleged exception to mootness described as wrongs capable of repetition yet evading review, which has been the basis for the mixed results on the issue of mootness in the context of election cases. That exception does not apply here because the two clear criteria for applying the exception – (i) that the injury is a type likely to happen to the plaintiff again; and (ii) that it is a type of injury of inherently limited duration – cannot be met here. *Id.* at pp. 138-39.

B. Application of the Constitutional Case-or-Controversy Mootness Limitation to Hague Convention Cases.

In the *Bekier* case, the court of appeals properly applied the case-or-controversy limitation to its analysis of mootness in the context of a Hague Convention case where the child at issue had returned to the requesting State of Israel with the father. *Bekier v. Bekier*, 248 F.3d 1051, 1054 (11th Cir. 2001). The Eleventh Circuit took the common sense and practical approach to the issue of mootness in *Bekier*. It held that a child's return to its requesting State from the United States pursuant to a district court order during the pendency of an appeal of the district court order renders the appeal moot. *Id.* at 1054.

Although the mother in *Bekier* had appealed the district court's decision, the appellate court explained that "what relief we can offer her or what 'legally cognizable interest [she has] in the outcome [of this appeal]' is not clear." *Bekier*, 248 F.3d at 1054 (quoting *Wakefield v. Church of Scientology of Cal.* 938. F.2d. 1226, 1229 (11th Cir. 1991)). The Eleventh Circuit further explained that a reversal of the district court's order would "provide Ms. Bekier with no actual affirmative relief. [The child] has already returned to Israel. Ms. Bekier's potential remedies now lie in the Israeli courts. Any words by us would be merely advisory." *Bekier*, 248 F.3d at 1054 (internal citations omitted).

The Eleventh Circuit explained that although a party "need not necessarily seek a stay of a lower court's judgment to perfect an appeal, 'the consequence

of failing to obtain a stay is that the prevailing party may treat the judgment of the district court as final.'" *Bekier*, 248 F.3d at 1054 (quoting *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.3d 1294, 1295 (11th Cir. 1984)). The Eleventh Circuit continued "[w]hen [the child] returned to Israel with his father, we became powerless to grant the relief requested by Ms. Bekier. And so we must dismiss this appeal." *Bekier*, 248 F.3d at 1055. The court held that "the United States Courts are restricted by the jurisdictional doctrine of mootness. Given our duty to respect the limits of our judicial authority, we will not create a 'live' case or controversy in an effort to promote the spirit of the Convention." *Id.* (citing *Walsh v. Walsh*, 221 F.3d 204, 214 (1st Cir. 2000) ("Neither the Convention nor the U.S. implementing legislation restricts the appellate process")). Here, the limits of the United States judicial authority have terminated.

In a similar vein, the First, Sixth, and Seventh Circuits, all indicating approval of the Eleventh Circuit's approach, have found that stays in Hague Convention matters may be appropriate in order to preserve a party's ability to appeal. *See Nicholson v. Pappalardo,* 605 F.3d 100, 106-7 (1st Cir. 2010); *Kijowska v. Haines*, 463 F.3d 583, 586 (7th Cir. 2006); *March v. Levine*, 249 F.3d 462, 468 (6th Cir. 2001); *Walsh*, 221 F.3d at 214.

C. Application of the Constitutional Case-or-Controversy Limitation to This Case.

The court below correctly applied the *Bekier* analysis and determined that there is no further decision that could be entered by any United States

court that may actually be carried into effect in the case before the United States court. This case therefore fits squarely within the instructions and examples provided by the *Mills* Court.

The Mother filed her petition in the district court seeking return of the child to Scotland. The Father opposed the petition seeking to prevent the child's return to Scotland. The one and only matter at issue before the district court was therefore whether the child should be returned to Scotland pursuant to Article 12 of the treaty. The district court's options were return or non-return. The district court ordered that the child be returned. The Father sought to prevent the return of the child to Scotland by filing a half-hearted request for a stay of the return in the district court pending the resolution of the appeal he intended to pursue in the Court of Appeals. By doing so he obviously acknowledged that exit of the child would indeed moot his appeal. The district court denied the request for a stay and the Father took no further action. He failed even to request a temporary stay for the purpose of seeking a stay from the appropriate court of appeals. He never even attempted to seek any type of stay from the court of appeals. And he did not file his Notice of Appeal until a month after the child had returned home.

The Mother and child returned to Scotland immediately as ordered by the district court, and have remained there ever since. The Convention's one and only return case remedy was executed upon the child's exit from the United States en route to Scotland. Put another way, the act the Father sought to be restrained – the child's return to Scotland – has been

consummated. The child is in Scotland and the Scottish court has entered custody orders. *See* Warrant of Citation, Order Continuing Warrant of Citation. The Scottish orders specifically provide that the child may not be removed from Scotland. *Id.* The United States courts cannot effect any control over these exclusive Scots law custody proceedings.

It is now impossible for any United States court to grant the Father here – or any parent in his situation – any relief that may actually be carried into effect in the case currently before the United States court. Any further judgment or order of a United States court cannot operate to require the child's re-return to the United States or to take jurisdiction away from Scotland. There is no nexus between a theoretical United States re-return order and the supposed power of a United States court to demand the former requesting State's custody court – that is seised with exclusive custody jurisdiction upon execution of the return order – to hand over the child for a re-return. Such a proposition is preposterous.

The Scottish court has ordered that the child is not to leave Scotland. *Id.* A further order of any United States court – even an order reversing the district court's return order and purporting to require the re-return of the child to the United States or purporting to change the habitual residence is too late and completely ineffective. Such an "order" cannot operate to effect any relief now as to the issue of whether the child should have been returned to Scotland. The child already has been returned to Scotland. All issues relating to the child's well-being lie in Scotland. Any further opinion or order of an appellate court would be

an impermissible advisory opinion, merely advising as to why the district court was correct, or not, in ordering the child's return to Scotland. But any such further order or opinion would offer no effectual relief – relief that could actually be carried into effect in the United States – to change the fact that the child has been returned to Scotland.

Scotland, as its own sovereign nation[6] with respect to Scots law, is under no duty to give any weight to an "order" for re-return entered by a United States court against its own Scots law *ne exeat* order entered and currently in effect in its own sovereign territory. And Scotland would not do so.

Here, just as in the examples provided in *Mills*, the intervening event of the child's exit from the United States and return to Scotland is owing to a power beyond the control of either party -- the return order of the district court and the Scottish court's subsequent *ne exeat* order prohibiting the removal of the child from Scotland. The rights of both parties here, just as in the examples provided in *Mills*, now come under the jurisdictional possession and control of the same person – the Scots legal system. And finally, the act sought to be restrained – the child's return to Scotland – has been consummated and cannot be undone by any order of a United States court. *See Mills*, 159 U.S. at 656-57.

In the Father's brief and in the briefs filed by *amici* in support of the Father, it is mistakenly argued that

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[6] Union with England Act, 1707, 6 Ann., c. 7 (G. Brit.); Scotland Act, 1998 (U.K. except c. 26).

this case is not moot because orders following appellate review of the district court's return order would have "real-world" or "concrete" consequences for the parties and that the parties continue to be involved in an ongoing controversy as to where the child should reside. Br. for U.S. at 14. This analysis is flawed because it misses the *Mills* "effect" requirement completely. The existence of "real-world" or "concrete" consequences for the parties is not the mootness test required by our Constitution and this Court. The test is whether there is any relief that can actually be carried into effect in the case currently before the United States court. Currently before the court – meaning the United States court – is the key provision and requirement that is overlooked repeatedly in the *amici* briefs in support of the Father. When not overlooked, this case and all such others, become crystal clear and are moot and must be dismissed.

The further flawed position that the case is not moot because an appellate decision reversing the district court may have some influence on future substantive child custody proceedings between the parties in another land is an incorrect application of the mootness analysis. Whether an order affects[7] or influences future proceedings in a different court and

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[7] "Effect" (to bring about) is often misused for "affect" (to influence). "The blunder is widespread," but the distinction and precise use are important here. *See* Garner at 34. Constitutional mootness first requires that relief can be effected (brought about) in the current case–not that an opinion affects (influences) the parties in some other way. *See Mills*, 159 U.S. at 653. The Father and *amici* blur this important distinction in their briefs in order to reach an incorrect and imprecise conclusion.

different country is not the same as effecting relief in the matter at issue in the case currently before the United States federal court. The argument advanced by the Father and *amici* is explicitly based on the proposition that an appellate order will be useful in a completely different court in a completely different matter. But this Court pointed out in *Church of Scientology* that appellate decisions or orders entered for the purpose of future use in other proceedings are arguably advisory opinions that are prohibited by Article III, § 2 of the United States Constitution. *Church of Scientology*, 506 U.S. at 12.

The controversy between the parties in the United States federal courts is over because the United States federal courts have provided all relief available under the treaty. Return or non-return are the only options. There are no partial remedies[8] in Hague Convention

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[8] In *Church of Scientology*, the Court held that where partial remedies that affect the matter in issue are available, a case is not moot. *Church of Scientology v. U.S.*, 506 U.S. at 12. That is not the case here. There are no partial remedies in Hague Convention matters. The only remedies available under the Convention are return or non-return. In *Church of Scientology*, the United States courts had the authority to order the IRS to return certain tapes to the petitioner that a lower court had erroneously allowed to be disclosed to the IRS. *Id.* The Court held that return of the tapes to the petitioner provided a partial remedy to the petitioner because the IRS would no longer be in possession of the tapes and no longer able to use them in the remanded proceedings before the lower courts. *Id.* The entire premise of the holding in *Church of Scientology* that the appeal was not moot because a partial remedy existed was based on the United States courts' ability to order the return of the tapes to the petitioner as a partial remedy. *Id.* No such partial remedy exists here. There is no mechanism by which

matters. The return has been executed and there are no further options. *See* Section III C *infra*.

III. There is no Constitutional due process right to an appeal.

A. The right to an appeal in the United States.

There is no due process right to an appeal under the United States Constitution. *McKane v. Durston*, 153 U.S. 684, 687 (1894). "Indeed, for a century after [the Supreme] Court was established, no appeal as of right existed in criminal cases, and, as a result, appellate review of criminal conviction was rarely allowed." *Abney v. United States*, 431 U.S. 651, 656 (1977). A general right of appeal in criminal cases was not even created until 1911. *Id.*

Holding that an appeal of a Hague Convention return order is moot upon a child's exit from the United States does not deprive the Father here of any constitutional or inherent right to have his case reviewed by an appellate court, as the Father and *amici* erroneously suggest – because there is none.

This Court has warned not to "confuse the familiar with the necessary" when considering a litigant's right to appeal. *Griffin v. Illinois*, 351 U.S. 12, 20 (1956) (Frankfurter, J. concurring). Justice Frankfurter

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an order of a United States court can require the courts of the sovereign nation of Scotland to return the child to the Father in the United States.

explained in his concurring opinion that, in the criminal context, the right to an appeal seems so established that it leads to the incorrect assumption that an appeal is "fundamental to the protection of life and liberty and therefore a necessary ingredient of due process of law." *Id.* But it is not. *Id.*

Appellate review of a final judgment of a lower court, even in a criminal case where the accused is convicted of a grave offense, "was not at common law, and is not now, a necessary element of due process of law." *McKane*, 153 U.S. at 687. Appellate review is a purely statutory right, rather than a constitutional entitlement, and "the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice." *United States v. Young*, 544 F.2d 415, 416 (9th Cir. 1976). And the modern "right" is being constantly eroded now almost by osmosis.

The Article III doctrine of mootness restricts courts' otherwise obligatory statutory appellate jurisdiction. The only possible statutory basis for an appeal of a Hague Convention return order is found in 28 U.S.C. § 1291, which provides that federal appellate courts have jurisdiction of appeals from all final decisions of the district courts of the United States. Neither ICARA nor the Convention require appellate review as of right. Appeal is not even mentioned.

Because the right to appeal is solely statutory[9] and not constitutional in order to exercise the statutory right of appeal, an appellant must come within the terms of the applicable statute. *Abney*, 431 U.S. at 656. "Of course, no statute could authorize a federal court to decide the merits of a legal question not posed in an Article III case or controversy. For that purpose, a case must exist at all the stages of appellate review." *U.S. Bancorp Mortgage Company v. Bonner Mall Partnership*, 513 U.S. 18, 21 (1994). Appellate courts

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[9] The analysis here is distinguishable from the analysis applied by the Spanish Constitutional Court in the Spanish case relied on by the Father and *amici* in their briefs. S.T.C., May 20, 2002 (B.O.E. No. 120, p.47) (Spain). In the Spanish case, the Spanish Constitutional Court held that the appellant in that case had been denied her "constitutional right to effective judicial protection" when her appeal was found by the lower appellate court to be moot upon the child's return to Poland. *Id.* at 25-26 (page numbers cited are to the English translation lodged by the United States). The Spanish Court held that there is a constitutional right to appeal under the Spanish constitution. *Id.* As explained above, there is no constitutional right to appeal in the United States. Even though the Spanish Constitutional Court held the mother's appeal was not moot, it did not hold that there should be a re-return of the child from Poland to Spain and did not explain any mechanism for executing a re-return. *Id.* Rather, it held the appeal was not moot because a decision finding that the mother did not abduct the child may be useful in a separate custody case conducted in Poland following the child's return. *Id.* The Spanish court's order did not purport to effect any relief in the case before it. It merely sought to affect other proceedings. Such an opinion would be considered an impermissible advisory opinion under the United States constitution. The Spanish case should therefore not be relied upon for the proposition that an appeal is not moot upon the child's exit from the requesting country because the Spanish Constitutional Court is permitted to issue advisory opinions, which United States courts are not.

have no subject matter jurisdiction over an appeal if it is moot. *Corder v. Lewis Palmer School District No. 38*, 566 F.3d 1219, 1224 (10th Cir. 2009). An appellant cannot come within the ambit of an appellate court's 28 U.S.C. § 1291 jurisdiction if the appellant cannot also establish the appellate court's subject matter jurisdiction. To deny an appellant review for failing to establish subject matter jurisdiction cannot be a deprivation of any due process right of the appellant because there is no due process right to appellate review.

B. Legislative Interpretation.

Just as there is no constitutional due process requirement of an appeal as of right, there is no requirement of appellate review as of right under the Convention or ICARA. States Parties entered into the Convention and the United States enacted ICARA in order to "promptly restore the factual situation that existed prior to a child's removal or retention" and to ensure the child's "swift return to his or her circumstances before the abduction or retention." H.R. REP. 10-525 at 6 (1988); *see also* Convention Preamble; *Abbott*, 130 S.Ct. at 1996. The entire point of the Convention is prompt return. ICARA was enacted to implement the Convention's purpose. Nothing in the text or legislative history of ICARA suggests that Congress contemplated mandatory appeals as of right in Hague Convention matters or that Congress intended in any way to attempt to avoid the Article III live case-or-controversy requirement in Hague Convention matters.

In its *amicus* brief, the United States suggests that *Greenlaw v. United States*, 554 U.S. 236 (2008), stands for the proposition that in order for an appeal of a Hague Convention return order to be considered moot upon the child's exit from the United States, Congress would have been expected to expressly state such a position in ICARA. (Br. For U.S. at 27). This analysis is an incorrect application of *Greenlaw* to the legislative intent of ICARA. The mistake is further compounded by an erroneous understanding of the Congressional intent.

In *Greenlaw*, this Court instructed that Congress is understood to legislate against a background of common-law adjudicatory principles." *Greenlaw*, 554 U.S. at 251. The doctrine of mootness is a long-standing adjudicatory principle having deep roots in common-law understanding. *See*, *Mills*, 159 U.S. at 653 (1895); *Cleveland v. Chamberlain*, 66 U.S. 419 (1861); *Lord v. Veazie*, 49 U.S. 251 (1850); *see also Honig v. Doe*, 484 U.S. 305, 339 (1988) (Scalia, J., dissenting). Congress must therefore be understood to have legislated ICARA having due consideration for the mootness doctrine. No inference can be drawn that Congress intended for the doctrine not to apply to cases brought under ICARA. Rather, if Congress had meant to require an appeal as of right, even when a child had been returned from the United States to the requesting State, it would have explicitly said so.

This Court further instructed in *Greenlaw* that courts should "resist attributing to Congress an intention to render a statute . . . internally inconsistent." *Greenlaw*, 554 U.S. at 251. The stated Congressional intent of ICARA is to implement the

super-fast Hague Convention remedy, which was designed to "promptly restore the factual situation that existed prior to a child's removal or retention" and to ensure the child's "swift return to his or her circumstances before the abduction or retention." H.R. REP. 10-525 at 6 (1988). Congress noted that certain provisions of ICARA are not intended to deny the possibility of appeal from a return order or a decision denying a return order. *Id.* at 11. The important language here is "possibility." Nowhere in ICARA or the Convention is there a requirement of an appeal as of right wherever the child may be. To interpret ICARA to support such a requirement would be to render the statute internally inconsistent with its stated purpose of ensuring the child's "swift return to his or her circumstances before the abduction or retention." *Id.* at 5.

Any concern with respect to preserving a party's 28 U.S.C. § 1291 statutory ability to appeal a Hague Convention return order can and should be addressed by the issuance of an appropriate stay of the return order in appropriate cases where the party seeking the stay meets the requirements set forth by this court for the issuance of a stay.[10] *See* Fed. R. App. Pro. 8; *Hilton*

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[10] Article 22 of the Hague Convention expressly provides that "[n]o security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention." Convention, art. 22. The Article 22 prohibition of bonds in Hague Convention cases is further explained by Elisa Pérez-Vera in her *Explanatory Report* that "the security, bond or deposit from which foreigners are exempt are those which, in any legal system and however described, are meant to guarantee

v. Braunskill, 107 S.Ct. 2113, 2120 (1987); *see also Garcia-Mir v. Meese,* 781 F.2d 1450, 1453 (11th Cir. 1986), *Ruiz v. Estelle,* 650 F.2d 555, 565 (5th Cir. 1981). Congress must also be understood to have legislated ICARA having due consideration for the process and procedure of obtaining a stay of execution of an order, which would avoid any mootness problem in Hague Convention appeals. *Greenlaw,* 554 U.S. at 251. There is no blanket draconian rule in Hague Convention cases that stays should not be granted in appropriate cases. A full analysis of the availability and appropriate use of the stay procedure is set forth below in Section IV.

C. Influence on future or related proceedings.

To the extent there is any concern with respect to the influence of an un-reviewed Convention return order on future custody proceedings between the parties where an appeal has been dismissed as moot, the established practice of appellate courts of vacating the un-reviewed order addresses any such concern. "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *U.S. Bancorp Mortgage,* 513 U.S. at 21.

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respect for decisions on the payment of costs and expenses arising out of legal proceedings." Elisa Pérez-Vera, *Explanatory Report on the 1980 Child Abduction Convention* (hereinafter, The "Perez-Vera Report"), at ¶ 106. Hague Conference on Private Int'l Law, *Actes et Documents de la Quatorzième session, Tome III, Child Abduction* (1982).

Vacating the un-reviewed lower court's order "clears the path for future litigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Id.* This Court has explained that the reference to "happenstance" is to be understood as a reference to the equitable tradition of *vacatur*. *Id.* The equitable entitlement to the extraordinary remedy of *vacatur* is invoked in these situations because a party who seeks review of the merits of a ruling, but has been "frustrated by the vagaries of circumstance ought not be forced to acquiesce in the judgment."

The Eleventh Circuit here did just that – it applied the extraordinary remedy of *vacatur* in the Father's favor when it dismissed his appeal as moot. Pet. App. 1-2; 15. This correct application of the mootness and *vacatur* doctrines furthered the objective of the Convention – the prompt return of a child to her habitual residence – while also eliminating any possibility that the un-reviewed return order could be used to negatively affect the father in any future proceedings. There can now be finality for the child in the requesting State and family court.

IV. Promptness and expedition to re-establish the *status quo ante* are the driving forces of the Convention. Appeal can be preserved by the correct application of the stay procedure where appropriate and expediting the appeal process.

States Parties entered into the Convention in order to "protect children internationally from the harmful effects of their wrongful removal or retention and to

establish procedures to ensure their prompt return to the State of their habitual residence." Convention Preamble; *Abbott*, 130 S.Ct. at 1996. The entire point of the Convention is prompt return.

The primary objective of the Convention is to "secure the prompt return of children wrongfully removed or retained in any Contracting State." Convention, art. 1. Where, as here, a child has been wrongfully retained, the Convention calls for the return of the child "forthwith." *Id.* at art. 12. Expedited procedures are provided because of the nature of Convention cases, the detrimental effect of delay on children's lives, and because the Hague Convention is a summary mechanism to ensure that the playing field is fair and that *both* parties have an opportunity to be heard in the requesting State's courts. *See Zajaczkowski v. Zajaczkowska*, 932 F. Supp. 128, 132 (D.Md. 1996).

Time is of the utmost essence and "the drafters of the treaty stressed the emergency nature of these cases. 'Its nature is one of emergency because it seeks a speedy and immediate solution to the cases involved.'" *March v. Levine*, 249 F.3d 462, 474 (6th Cir. 2001) (quoting the Pérez-Vera Report at ¶ 25).

In order to effect the objectives of the Convention and to achieve an expeditious resolution to proceedings, Convention petitions may be treated as applications for a Writ of Habeas Corpus. *Zajaczkowski*, 932 F. Supp. at 132 ("[T]he Court will treat the [Convention] petition as an application for a writ of habeas corpus . . . pursuant to 28 U.S.C.A. § 2243").

The Permanent Bureau of the Hague Conference advises in its Guide to Good Practice that "[s]peed is important at all stages of Convention proceedings" and that the "Convention's obligation to process return applications expeditiously also extends to appeal procedures." GUIDE TO GOOD PRACTICE UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, Part IV-Enforcement (hereinafter, the "Guide to Good Practice") ¶¶ 50-51 (2010). The Permanent Bureau recognizes that "[i]n view of the requirement of promptness underlying the Convention, it is important to establish a timeframe for the courts." *Id.* at ¶52.

In the United States Courts of Appeal, the average time from filing a civil matter in the lower court to final disposition in the appellate court is 30.8 months – nearly three years. *See* U.S. Courts of Appeals – Median Time Intervals in Months for merit Terminations of Appeals Arising From the U.S. District Court, by Circuit, During the 12-month Period Ending September 30, 2011, Table B-4A, available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/B04ASep11.pdf (last visited October 26, 2012). The average time from filing the notice of appeal to final disposition of the appeal is 11.8 months. *Id.* The goal set forth in the Convention from filing the Petition for Return to final resolution is six weeks. Convention, art. 11.

In international parental abduction cases, the judicial authorities of the United States are therefore charged with the goal of reaching a decision within six weeks of the commencement of the proceedings. Convention, art. 11. Indeed, the language dealing with

the time factor throughout the Convention mandates the use of the most speedy procedures available and the granting of priority treatment. Pérez-Vera Report at ¶ 104. As explained in the Guide to Good Practice, this urgency includes resolution of any appeal. Guide to Good Practice at ¶¶ 50-51.

Taking these timeframes into consideration, the Guide to Good Practice recommends limiting the availability of legal challenges to return orders in order to serve the Convention's primary objective of prompt return. Guide to Good Practice, Vol. IV, 13, ¶¶ 50-51. It further suggests that if appeals are permitted at all then they be expedited, and enforcement of a return order stayed pending final review. *Id.* The Guide explains that the approach of expediting appeals "balances the need for speedy implementation of a return order with the risk of rendering a well-founded appeal meaningless because the return has already taken place while the appeal was pending." *Id.* at ¶73.

States Parties generally adhere to this guidance. The United Kingdom, for example, applies these principles and has adopted just such an approach. Appeals are permitted only with leave of court – either the court of first instance, or with leave of the court of appeals if leave is denied by the court of first instance – and must be lodged in an expedited time period. *See Re F (Abduction; Child's Wishes)* [2007] EWCA Civ. 468 (Eng. & Wales). The Head of International Family Justice for England & Wales, the Rt Hon. Lord Justice Thorpe, states that the six week conclusion of a Hague Convention case is inclusive of the appellate stage and that the various other obligations of the judiciary contained within the Convention do not override the

obligation to conclude the proceedings within six weeks of commencement of proceedings. *Id.* at ¶¶ 24, 28.

A seven day expedited deadline for lodging a notice of appeal "should be the norm in any case in which an application for permission to appeal is made to a trial judge and refused by him or her," which would "give the court a better chance of concluding the litigation within the 6-week period." *Id.* at ¶ 28; *see e.g. Klentzeris v. Klentzeris* [2007] EWCA Civ 533 (Convention return case where proceedings commenced in the court of first instance on February 7, 2007 and concluded in the appellate court on May 10, 2007); *see also* Jeremy Morley, *U.S. Hypocrisy Concerning International Child Abduction*, INTERNATIONAL BAR ASSOCIATION NEWSLETTER, September 2010, available at http://www.international-divorce.com/us-hypocrisy-concerning-international-child-abductions (explaining the United Kingdom fast track appeal procedure).

The American system is theoretically well-suited for such an approach and theoretically allows exactly the approach suggested in the Guide to Good Practice. Several of the circuits do attempt to take such a fast-track approach. The mechanism of staying the enforcement of a return order in order to preserve a party's statutory ability to appeal in appropriate cases is available where the party seeking the stay meets the strict requirements already set forth by this Court. *See Hilton,* 107 S.Ct. at 2120; *see also Garcia-Mir*, 781 F.2d at 1453, *Ruiz v. Estelle,* 650 F.2d at 565. As suggested in the Guide to Good Practice, an appropriate balancing of the need for speedy resolution against the risk of a well-founded appeal being rendered meaningless upon the child's exit from the requested

country, is to stay a return order and expedite resolution of the appeal on the merits. Guide to Good Practice at ¶ 73.

Several United States federal appellate circuits have opined on the issue of mootness in the context of a Hague Convention case where the child at issue has exited the United States during the pendency of an appeal of a district court's order. These circuits have found a straightforward, fair and sensible way to deal with these circumstances. These courts stay the district court's return order and expedite the appeal when the appellant meets the already established criteria for the issuance of a stay.[11]

The First Circuit, for example, which has held that a child's exit from the United States moots any appeal, stays district court return orders in appropriate cases to preserve a party's statutory ability to appeal, and by way of compromise, expedites the appeal. In the *Nicholson v. Pappalardo* case, the First Circuit's Order provided as follows:

> Appellant's motion for a stay of the district court's order pending appeal is allowed, and the order granting the Petition to Return Child is stayed pending a resolution of this appeal.

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[11] Factors regulating the issuance of a stay of an order pending appeal are generally the same in all circuits: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies. *Hilton*, 481 U.S. 770, 777 (1987).

> Without necessarily finding a clear probability that appellant will prevail, we grant the stay because there are fair grounds for litigation on appeal, a risk exists that the case could effectively be mooted by the child's departure, our expedition of the appeal will minimize the adverse effects of granting the stay, and maintaining stability for the child in the interim is a significant equity. See Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 19 (1st Cir. 1996) ("the predicted harm and the likelihood of success on the merits must be juxtaposed and weighed in tandem"). An order will enter forthwith establishing an expedited briefing schedule and date for oral argument.

Order, United States Court for Appeals for the First Circuit, Feb. 19, 2010 (Case 10-1125, Docket Entry No. 5419173)

The Seventh Circuit, which has also adopted the view that a child's exit from the United States moots any appeal, also stays district court return orders in order to preserve a party's statutory ability to appeal and in compromise, expedites the appeal. In *Kijowska v. Haines*, the Seventh Circuit stayed the district court return order and accelerated briefing and argument. *Kijowska v. Haines*, 463 F.3d 583, 586 (7th Cir. 2006). In *Koch v. Koch*, the Seventh Circuit granted a respondent's request for a stay even after the district court had "promptly denied" the same request by the respondent. The Seventh Circuit then expedited the appeal. *See*, *Koch v. Koch*, 450 F.3d 703, 709 (7th Cir. 2006).

Even the Third Circuit, which has held that an appeal of a Hague Convention matter is not moot upon a child's exit from the United States, grants stays of district court order in appropriate circumstances. In *Karpenko v. Leendertz*, the district court entered a stay of its own return order, holding that "[w]hile Petitioner will be understandably disappointed with having to wait for a longer period of time to take her daughter back to the Netherlands, such disappointment is clearly outweighed by the irreparable harm that will be suffered by the Respondent." *See Karpenko v. Leendertz*, 619 F.3d 259 (3d Cir. 2010).

The Sixth Circuit initially took the position in *dicta* contained in a footnote in an early reported Hague Convention case, *Friedrich v. Friedrich*, 78 F.3d 1060, 1063 n.1 (6th Cir. 1996), that stays of return orders in Hague Convention matters should "hardly be a matter of course." But since the *Friedrich* case was decided fifteen years ago, the Sixth Circuit itself has updated its position and adopted the position that a child's exit from the United States renders an appeal moot. The Sixth Circuit's modern approach in the current state of Hague Convention jurisprudence is to grant stays of district court return orders in Hague Convention matters in appropriate cases "in aid of appellate jurisdiction." *See e.g. March v. Levine*, 249 F.3d 462, 468 (6th Cir. 2001).

This approach is not to suggest that a stay should be granted in every Hague Convention return case, just as not every convention litigant in the United Kingdom is granted leave to appeal, not every applicant for a stay in the U.S. will or should be granted a stay. And taking the position that a Hague Convention appeal

becomes moot would not overburden the appellate courts. A parent seeking a stay of a return order would of course still be required to meet his or her heavy burden of establishing entitlement to a stay already clearly set forth by this Court and the courts of appeal. *See Hilton,* 107 S.Ct. at 2120; *see also Garcia-Mir*, 781 F.2d at 1453, *Ruiz v. Estelle,* 650 F.2d at 565.

The Father here inexplicably chose not to employ all available mechanism to prevent his appeal from becoming moot. After the district court denied his motion to stay the return order, the Father then failed to request a temporary stay from the district court until the Eleventh Circuit could rule on a motion to stay, given the district court's denial of the Father's request. The Father also did not seek a temporary stay of the district court's order so that the Eleventh Circuit could rule on its own motion to stay if the district court was not inclined to grant the Father's motion to stay. This case then became moot as a result of the Father's failure to act fully, when the Mother and child returned home to Scotland as ordered by the district court's final order.

V. United States law does not provide for re-returns.

Even if this appeal were to be permitted to proceed, and even if the Father were to prevail in this case on appeal, such a ruling could never remove the barriers preventing the Alabama state court from proceeding to adjudicate custody in the United States. Upon exit from the United States and upon the Scottish court being seised with custody jurisdiction, the Alabama state court lost the right to adjudicate custody in the

United States forever. The Scotland court now cares for the child's well-being.

Under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), for example, a state court may not exercise any subject-matter jurisdiction to make a child-custody determination when the child's home State is elsewhere and a court in that other State has jurisdiction to adjudicate custody. *See* UCCJEA § 201(a), 9 U.L.A. 671 (codified in relevant part at Ala. Code § 30-3B-102(4) (LexisNexis 2011). The return order in due course has made the child's home State Scotland. And in any event, Scotland was immediately seised with jurisdiction to adjudicate custody upon execution of the return order. There is no mechanism to undo this statutory framework – nor should there be.

Even if the return order were to be overturned on appeal, Scotland does not lose its jurisdiction to adjudicate custody. Scotland continues to this day to be the child's home State and continues to have jurisdiction to adjudicate custody both under our UCCJEA as well as Scots law. *See* Children (Scotland) Act 1995 s. 11. *See also* Council Regulation (EC) No. 2201/2003, repealing Council Regulation (EC) No. 1347/2000 (the "Brussels II *bis* treaty").[12] Comity does

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[12] The Brussels II *bis* treaty does not apply to the United States because of course it is a European Union treaty that only applies to member states. In its *amicus* brief, the National Center for Missing and Exploited Children ("NCMEC") suggests that the Brussels II *bis* treaty is a mechanism for enforcement of United States custody orders. But NCMEC could not identify a single case where a United States custody order had been enforced under this treaty. Br. for NCMEC Br. at 21, n.12. Such enforcement would be

not come into play because both countries' laws agree that Scotland – and only Scotland – has jurisdiction to adjudicate custody. Here the whole purpose of the Convention comes into plain view – the avoidance of competing custody proceedings in different international jurisdictions. Here is why the exit of a child moots an appeal. Here is why the mootness issue is constitutional and not prudential. Indeed the Convention is sometimes referred to as a "Super-UCCJEA" to emphasize the point that one of the Convention's primary purposes is to prevent competing custody proceedings – as with UCCJEA inter-state case resolution.

It goes without saying that the UCCJEA cannot be used to attempt to seek international enforcement of what would be considered a rogue United States custody adjudication following a flawed and failed re-return demand. The UCCJEA obviously has no application outside the United States, Guam and the U.S. Virgin Islands. By the same token, the enforcement of Hague orders provision in the UCCJEA is territorially-limited to the enforcement of such orders to remove a child from the United States or the Virgin Islands back to the requesting country. See UCCJEA § 302, 9 U.L.A. 671 (codified in relevant part at Ala. Code § 30-3B-302 (LexisNexis 2011). There is no UCCJEA enforcement mechanism to claw back a child from another country that has jurisdiction to adjudicate custody by virtue of a United States return

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an impossibility for obvious reasons -- the United States is not a signatory to European Union treaties because it is not a member state.

order to that country, regardless of the overturning of an article 12 order on appeal years down the road.

VI. Texts of the Convention and ICARA support no re-return.

A. The text of the Convention does not support re-return.

As was previously mentioned in this brief, Article 12 is the key provision of the Hague Convention, providing in its first paragraph that the court seised – in the case of wrongful removal or retention of the child – "shall order the return of the child *forthwith*." (emphasis added). Convention, art. 12. There is no other substantive remedy in the treaty for this tort; the right to recover costs, legal fees, and necessary expenses being simply collateral to a successful suit for return of the child. *See* Convention, art. 26.

The second paragraph of Article 12 adds an additional possible exception to the court's duty to return the child when proceedings for return were initiated more than one year after the wrongful removal or retention. Convention, art. 12. This paragraph is not in play in the current case.

The substance of the first two paragraphs was in the Preliminary Draft of the Hague Convention, drawn up by the Special Commission which met twice in 1979. The third paragraph was added at the meeting of the Diplomatic Conference which met during three weeks in October of 1980. It was initiated by Working Document No. 39, submitted by the Canadian

Delegation.[13] The language which this delegation proposed to add to Article 11 of the Preliminary Draft – which became Article 12 of the Convention's text – was as follows: "[w]here the judicial or administrative authority referred to in paragraph *a* believes that the child has been taken to another State, it may stay all proceedings."

There is no indication in the discussion of the Canadian proposal[14] or in the vote taken adopting it[15] that the delegations were thinking of procedures following return of the child under a court order when they adopted this proposal - after adding the words "or dismiss the application concerning the return of the child' to its text. A stay would have been an appropriate procedure if the child were to be taken to a third State while proceedings were pending, but the Netherlands had no provision for a stay in its law, so the option of dismissal was added.

This procedure clearly was not designed for the case where a child goes back to the requesting State under a return order handed down in a Hague Convention lawsuit. To the extent to which its wording might technically be seen as including a situation in which the child has gone back pursuant to a court order, the provision for a "stay" is clearly inappropriate, since the

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[13] Working Document No. 39, 290, Hague Conference on Private International Law, *Actes et Documents de la Quatorzième session, Tome III, Child Abduction* (1982) (hereinafter "Tome III").

[14] *Id.* at 294.

[15] *Id.* at 294.

sole substantive remedy under the treaty is return to that State. Under those circumstances, only a dismissal (or a vacatur) would be appropriate.

B. The text of ICARA does not support re-return.

The implementing legislation for the Hague Convention – the International Child Abduction Remedies Act – took effect for the United States together with the treaty on the 1st day of July 1988. The Office of Children's Issues was created in the Bureau of Consular Affairs of the U.S. Department of State, in order to serve as the Central Authority which each Party is required to designate under Article 6 of the Convention. *See* ICARA §§ 11606, 11608(a). The findings and declarations of Congress are in Section 11601.

Notable among the findings are: "(1) The international abduction or wrongful retention of children is harmful to their well-being; and (4) The Convention ... establishes legal rights and procedures for the *prompt* [emphasis supplied] return of children who have been wrongfully removed or retained ... Children who are wrongfully removed or retained within the meaning of the Convention are to be *promptly* (emphasis added) returned ..." ICARA, § 11601.

Notable among the declarations are: "(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States; ... (4) The Convention and this chapter empower courts in the United States to determine only rights under the

Convention and not the merits of any underlying child custody claims." ICARA, § 11601.

Section 11603 on "Judicial Remedies", in its subsection (d), provides: "[t]he court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention."

Neither the Hague Convention nor ICARA says anything about appeals from the United States district courts which under Section 11603(a) have – together with the courts of the States – "concurrent original jurisdiction of actions arising under the Convention."

The Convention stresses speed, which was seen at the time of its drafting in 1979 and 1980, to be required in order to comport with the "child's sense of time" – a notion that was given widespread currency in the book published in the United States in 1973 entitled Beyond the Best Interests of the Child. The multidisciplinary authors were Joseph Goldstein, Anna Freud and Albert J. Solnit.

Article 2 of the Convention calls for "the most expeditious procedures available" and Article 11 requires courts to "act expeditiously in proceedings for the return of children." These provisions echo the following sections of the August 1978 report by Adair Dyer entitled "Report on international child abduction by one parent ('legal kidnapping')" which initiated the work on preparation of the Hague Convention: "Expediting the return of the child" Tome III at 47-48 and "The influence of lapse of time" *Id.* at 23-24.

The book by Goldstein, Freud and Solnit mentioned above was cited in the report at footnote 18, *Id.* at 22.

While some courts in the United States have responded to the needs of children abducted internationally with commendable focus and attention, there have been notable lapses in fully comprehending the need for rapid resolution of these international controversies. The Eleventh Circuit in *Bekier* and in this case has strictly applied the legal principle that return should be forthwith, unless it has been stayed by the district court or by the court of appeals. Some other circuits ignore the failure of parties to use their rights and allow appeals to start and to drag on pointlessly after the child has been duly returned under a district court order. *See e.g. Larbie v. Larbie*, 690 F.3d 295 (5th Cir. 2012) petition for cert. pending, No. 12-304 (filed Sept. 7, 2012). This Court has the power and the duty to resolve these differences in favor of expeditious procedure, as provided in the Hague Convention and ICARA.

VII. Children's well-being is paramount.

A. Lengthy appeals are inconsistent with child's well being

States Parties to the Convention are "[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody." Convention Preamble States Parties entered into the Convention in order to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State

of their habitual residence." Convention Preamble; *Abbott*, 130 S.Ct. 1983, 1996.

States Parties carefully considered the child's sense of time in the drafting of the Convention and in the drafters' choice of the term "expeditious" appearing in Articles 2 and 11 of the treaty. As explained above, the drafters were aware that "[a] child's sense of time is based on the urgency of his or her instinctual and emotional needs and thus differs from an adult's sense of time, as adults are better able to anticipate the future and thus to manage delay. " *See* Joseph Goldstein, Anna Freud and Albert J. Solnit, BEYOND THE BEST INTERESTS OF THE CHILD, 98 (Free Press, 1st ed. 1973).

Indeed, when a custody dispute spans more than one country and more than one legal system – as is increasingly common – "the difficulties may well be exacerbated by uncertainty as to which authorities are competent and the likelihood that one of the parents will have to deal with a legal system even less familiar than his or her own, often in a language which is not his or her own." Case C-256109, *Purrucker v. Valles Perez*, [2011] 3 W.L.R. 982, 999 (Mar. 17, 2010).

Such difficulties cannot be legislated out of existence. They highlight, however, the absolute necessity of a clear set of rules on jurisdiction, where delay and uncertainty can be particularly harmful to the best interests of those primarily concerned – the children. *Id.* at 1000. The Convention, as implemented in the United States by ICARA, provides the child's needs for a secure environment. It should not allow for a situation where a parent can use the United States'

appeal process to continue a battle which, instead of winning for him or her through the re-return of the child, will lead to no resolution – with a win in name only.

B. Re-return orders defeat the purpose of the Convention.

The reality of the situation created if an appeal is not moot upon a child's exit from the United States is that there will be competing custody and visitation orders between the United States and the requesting country. And there will be a finality for the child. This scenario is exactly what the Hague Convention seeks to prevent and is violative of the whole principle of comity that is the heart of the treaty.

Comity is "at the heart of the [Hague] Convention." *Diorinou v. Mezitis*, 237 F.3d 133, 142 (2d Cir. 2001) (quoting *Blondin v. Dubois*, 189 F.3d at 248 (2d Cir. 1999)). The Hague Convention is designed to secure "international cooperation regarding the return of a child wrongfully taken by a parent from one country to another." *Gonzalez v. Gutierrez*, 311 F.3d 942, 944 (9th Cir. 2002).

The Pérez-Vera Report further explains that the concept of comity is at the heart of the Hague Convention, stating that the Convention is "above all a convention which seeks to prevent the international removal of children by creating a system of close co-operation among the judicial and administrative authorities of the Contracting States." Pérez-Vera Report at ¶ 35.

Any approach other than finding an appeal moot and thereby according comity to subsequent orders entered by the requesting state – Scotland here – undermines the purpose and co-operative nature of the Hague Convention. Any other approach results in chaos, forum shopping, and snatch-and-grab custody – exactly what the Convention seeks to prevent.

The Fifth Circuit's recent *Larbie v. Larbie* case provides a clear demonstration and real-world example of the chaos created by allowing an appeal to proceed after a child has been returned and jurisdiction has been ceded to a foreign court. *Larbie*, 690 F.3d 295 (5th Cir. 2012), petition for cert. pending, No. 12-304 (filed Sept. 7, 2012).

In *Larbie*, also over a year ago, the mother and six-year-old child returned to the United Kingdom as ordered by the district court in its Hague Convention return order. *Id.* at 305. The return order returned the child to his habitual residence of the United Kingdom and ceded jurisdiction over the child to the United Kingdom, all as provided for and contemplated by the Hague Convention. *Id.* The mother and child returned to the English court's jurisdiction pursuant to a valid final order of a federal district court. *Id.* The Father did not file any request to stay the district court's order in either the district court or circuit court pending his appeal.

Immediately after the mother and child returned to the United Kingdom, the parties, both represented by counsel, participated in extensive custody litigation in the United Kingdom courts. *See* Petition for Writ of Certiorari, Supreme Court of the United States, Sept.

7, 2012, No. 12-204. Both parties invoked the jurisdiction of the United Kingdom courts by filing applications for relief, including residence and contact (the United States equivalent of custody and visitation), in the United Kingdom. *Id.* at Pet. App. 54-91. The custody litigation in the United Kingdom resulted in numerous detailed custody and visitation orders being issued by the court in the United Kingdom with both parties' full participation. *Id.* The first United Kingdom order was entered on November 23, 2011 – just three months after the child returned – and the most recent order was entered just two months ago. *Id.* At Pet. App. 54. The United Kingdom orders are based emphatically on the father's express agreement and statement that he "unequivocally concedes" that the courts in the United Kingdom now have exclusive jurisdiction to decide all matters concerning the child. *Id.* at Pet. App. 64-85.

The case proceeds to this day in the courts in the United Kingdom. *Id.* at Pet. App. 54-91. The United States court vested jurisdiction back to the United Kingdom, and the United Kingdom has taken jurisdiction and proceeded accordingly. Even though the child had already returned to the United Kingdom, and even though the father was fully participating in child custody proceedings in the United Kingdom, he proceeded to appeal the district court's return order to the Court of Appeals for the Fifth Circuit. *Id.* at Pet. App. 1-16. The Fifth Circuit in *Larbie* took the opposite approach to the Eleventh Circuit in this case and held that the father's appeal is not moot, despite the fact that the child has returned to the United Kingdom and the parties are engaging in custody litigation there all pursuant to article 12 of the treaty. *Id.* at Pet. App. 18.

As a result of the Fifth Circuit's opinion in *Larbie*, the district court was mandated to enter an order that purports to wrest the jurisdiction that was already conferred and ceded upon the United Kingdom courts based on the return order back to the United States. *Id.* at Pet. App. 33-34. The Fifth Circuit's decision has created a comity maelstrom between the United Kingdom and the United States resulting in competing child custody orders in the two treaty signatory nations, both of which now consider that they have jurisdiction over the child. This is the exact competing-custody-order-scenario the Hague Convention was designed to prevent. It is exactly why appeals of Convention return order must be considered moot upon the child's exit from the United States.

In contrast, the court below in this case took the correct approach in keeping with the States Parties' intent and the Convention's purpose that the interests of children are of paramount importance in matters relating to their custody.

As clearly contemplated, understood, and intended by States Parties, the court below allowed the jurisdiction to which the child was returned to proceed make custody determinations with respect to the child upon the child's return. Scotland has proceeded to issue orders. There are no competing orders in the United States. The system contemplated by the Convention has been properly applied and has worked without delay and uncertainty. Stability has returned to the child's life. There is finality.

To take any other approach leaves the child in limbo and puts the parties in the position they would have

been in more thirty years ago before the United States ratified the Convention. This cannot possibly be the right result and cannot be the correct application of the treaty and ICARA.

CONCLUSION

At the heart of the Hague Convention is a desire to protect children. Convention Preamble. The treaty and its implementing legislation must be interpreted in that framework. Leaving a child in limbo while custody is litigated in two sovereign nations over several years cannot be the correct application of the treaty and ICARA when considered against the Convention's stated goals. The competing-custody-order-scenario created when an appeal of a return order is not considered moot upon the child's exit from the United States is exactly what the Hague Convention was designed to prevent. It is why appeals of Convention return orders must be considered moot upon the child's exit from the United States under the constitutional doctrine of mootness.

The opinion of the United States Court of Appeals for the Eleventh Circuit should therefore be affirmed.

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October 29, 2012

REPLY BRIEF

No. 11-1347

In The Supreme Court of the United States

JEFFREY LEE CHAFIN,

Petitioner,

v.

LYNNE HALES CHAFIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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PETITIONER'S REPLY BRIEF

In a Hague Convention proceeding, a court makes a threshold determination of the child's habitual residence and whether the child was wrongfully removed or retained. The judgment may order the child's return to her country of habitual residence. It operates as a traffic signal, effectively determining which forum will proceed to adjudicate custody under which body of law. Pet'r Br. 2-3, 30, 41-42.

Because reversal of the federal Hague Convention judgment would provide relief to Sergeant Chafin, this case is not moot. The district court's ruling has harmed Sergeant Chafin by removing his daughter to Scotland and thus enabling custody proceedings to go forward there. It has also resulted in a monetary judgment for fees, costs, and travel expenses against him. A favorable ruling on appeal could redress those injuries in three ways: First, based on that ruling, the district court or court of appeals could order Mrs. Chafin to return E.C. to the United States and overturn the monetary award. Second, a favorable ruling on remand would give Alabama courts a green light to resume adjudicating custody. And third, it could give Scottish courts a red light, influencing or halting their custody proceedings. Sergeant Chafin could then rely upon the favorable federal judgment in filing a new Hague Convention petition in Scotland for E.C.'s return to the United States.

In response, Mrs. Chafin makes three basic claims. First, she asserts that, because she and E.C. are now in Scotland, the federal court could not effectuate any relief. Resp't Br. 15-16, 22-24. Second, she argues that any possible effects on the ongoing Scottish and Alabama cases are irrelevant to mootness. *Id.* at 18, 25-26. And third, she insists that "Scotland, as its own sovereign nation," would never "give any weight . . . in its own sovereign territory" to a U.S. reversal of a Hague Convention judgment. *Id.* at 24. In making these claims, Mrs. Chafin cites few relevant authorities and rarely if ever responds to Sergeant Chafin's authorities.

At root, most of Mrs. Chafin's arguments rest on a single faulty premise. She confuses the possibility of *ordering* effectual relief with the probability or difficulty of *enforcing* it. Pet'r Br. 15, 25-27; U.S. Br. 21-22. The former inquiry matters for the mootness analysis; the latter does not. Nor does it matter whether relief will come from the initial federal case or from a separate proceeding, such as the parallel Scottish or Alabama litigation here. Since the court of appeals' reversal could result in relief in any or all of these three proceedings, this case is not moot.

I. Because Relief Is Not Impossible Here, This Appeal Is Not Moot

1. During the century since it decided *Mills* v. *Green*, 159 U.S. 651 (1895), this Court has repeatedly explained that "[a] case becomes moot only when it is

impossible for a court to grant any effectual relief whatever." *Knox* v. *Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (emphasis added) (quoting a series of precedents back to *Mills*, 159 U.S. at 653) (internal quotation marks omitted). That standard requires true impossibility, not mere unlikelihood or contingency upon a possible future event. *See Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992) (quoting *Mills*, 159 U.S. at 653); Pet'r Br. 17-20.[1]

Mrs. Chafin does not contest that point. Resp't Br. 18 (quoting *Mills*, 159 U.S. at 653). Nor does she contest that she bears the "'formidable burden'" of proving that her own action of removing E.C. to Scotland caused that kind of true impossibility. Pet'r Br. 33 (quoting *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)).

2. This is not a case where relief is impossible. As our opening brief explained, relief would be truly impossible if E.C. had died or reached the age of majority or if her parents had reconciled and dismissed their litigation. Pet'r Br. 19-20; U.S. Br. 22-23. Mrs. Chafin does not argue that any of those events has occurred.

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[1] Mrs. Chafin cites *Church of Scientology* for the proposition that "appellate decisions or orders entered for the purpose of future use in other proceedings are arguably advisory opinions that are prohibited by Article III, § 2 of the United States Constitution." Resp't Br. 26 (citing 506 U.S. at 12). But *Church of Scientology* contains no such language or statement.

Instead, Mrs. Chafin reveals confusion about what impossibility means. She attempts to draw a distinction between a judgment that "effects" relief and one that merely "affects" the outcome. Resp't Br. 25-26 & n.7. But this Court has used both words to describe outcomes that defeat mootness. *See Knox*, 132 S. Ct. at 2288 ("[T]he nature of the notice may affect how many employees who object to the union's special assessment will be able to get their money back."); *Mills*, 159 U.S. at 653 (issue is whether a court's decision might "affect the matter in issue in the case before it"; using that phrase interchangeably on the same page with "effectual relief" that "can be carried into effect").[2] If a judgment could carry any such influence, relief is not impossible.

3. At its core, Mrs. Chafin's argument confuses the impossibility of ordering relief with potential difficulties in enforcing a judgment. In her words, "[t]he Hague case must stop there [after Mrs. Chafin

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[2] Mrs. Chafin also cites *Mills* for the proposition that a suit to enjoin the incorporation of a village was mooted once the village was incorporated. Resp't Br. 19 (citing *Mills*, 159 U.S. at 656-57). The problem in the example discussed in *Mills*, however, was that the supplemental complaint had been filed after the village was in fact incorporated and should instead have named "[t]he village itself, or the trustees who are now exercising the franchise, [as] the necessary parties to the action," rather than the incorporators. *Mills*, 159 U.S. at 657 (quoting *People* v. *Clark*, 70 N.Y. 518, 520 (1877)). *Mills* nowhere suggests that the suit would have been moot – or that it would have been impossible to undo the incorporation – if the plaintiffs had named the proper defendants.

left the country with E.C.] because it has no further force of law," as "[t]here is no judicial process or power here to resolve custody issues there – in Scotland." Resp't Br. 13, 17.

Article III courts may issue judgments in live cases over which they have subject-matter jurisdiction, even if the litigant or subject of the litigation is currently elsewhere. There is a settled federal practice of issuing judgments that will be enforced elsewhere. *See, e.g.*, 28 U.S.C. § 1963 (procedure for registering judgments to be enforced in other districts). The district court's power to "command persons properly before it to cease or perform acts outside its territorial jurisdiction" extends to those currently living abroad so long as the order does "no[t] interfere[ ] with the sovereignty of another nation." *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 289 (1952). Thus, appeals brought against fugitives, deportees, and others living abroad are not thereby moot. Pet'r Br. 26-27.[3] The fugitive or foreigner may

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[3] Under the distinct fugitive-disentitlement doctrine, "an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal." *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 239 (1993). "[S]uch an escape does not strip the case of its character as an adjudicable case or controversy," but it is "tantamount to waiver or abandonment" by the losing party *seeking* relief from the court of appeals, not, as here, an attempt by a party who prevailed to avoid appellate review sought by the losing party. *Id.* at 240 (internal quotation marks omitted). Far from resulting in mootness, which would require dismissal of an appeal, the

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be extradited, and the deportee may return, lawfully or even unlawfully. *Id.*; U.S. Br. 16. Mrs. Chafin's brief never acknowledges these settled practices or grapples with their implications for this case. Her approach would upend all of them.

4. Mrs. Chafin could also choose to return to the United States with E.C. or to comply with a federal court order by sending E.C. back. Pet'r Br. 26-27; U.S. Br. 16. Her mere assertion that she and E.C. will not return to the United States, Resp't Br. 10, cannot terminate a federal court's jurisdiction. That jurisdiction does not depend on weighing her sincerity, her present intentions as to the future, or the likely course of other events that may alter her calculations, as any *possibility* suffices to defeat mootness. Pet'r Br. 18-19. In any event, a federal appellate court cannot be expected to examine the truth of such self-serving assertions as a precondition to deciding mootness.

Nor is there any barrier to E.C.'s return. Mrs. Chafin's statement that the *ne exeat* order prevents her from returning with the child, Resp't Br. 24, is incorrect. It is, in essence, a temporary restraining order to preserve the status quo. The order expressly binds only "the defender [Sergeant Chafin] or any person instructed by or acting on behalf of the defender." Interlocutory Order, *Hales* v. *Chafin*, No.

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doctrine gives the court "*discretion* to refuse to hear a criminal case." *Id.* (emphasis added) (internal quotation marks omitted).

F544/11 (Sheriffdom of S. Strathclyde, Dumfries & Galloway at Airdrie, Scotland, filed Dec. 22, 201[1]). Even if the order did bind Mrs. Chafin, she could simply dismiss her case, or the Scottish court could vacate the interim injunction and order E.C.'s return.

5. Insofar as Mrs. Chafin's arguments are premised on a claim that the court has no jurisdiction over her, that claim is mistaken. Mrs. Chafin submitted to federal jurisdiction by filing her federal suit. Pet'r Br. 25-26; U.S. Br. 15; *see Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451 (1932). She could not deprive the federal courts of *in personam* jurisdiction over her by leaving the country.[4] Once a "judicial proceeding is begun with jurisdiction over the person of the party concerned," the court has the power to bind the party "by every subsequent order in the cause." *Mich. Trust Co.* v. *Ferry*, 228 U.S. 346, 353 (1913). A contrary rule would let litigants manipulate federal jurisdiction, strategically mooting their own cases by leaving the country.[5]

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[4] Mrs. Chafin repeatedly asserts that the district court ordered E.C. to leave the United States with Mrs. Chafin for Scotland. *See, e.g.*, Resp't Br. 8. The district court's order did not compel their departure, however; it "permitted [them] to return to Scotland." Pet. App. 13.

[5] In mootness cases, this Court has recognized the "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review." *Erie* v. *Pap's AM*, 529 U.S. 277, 288 (2000). That rationale underlies the voluntary-cessation exception to the mootness doctrine. Thus, even though the elderly plaintiff in that case had

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II. Sergeant Chafin's Appeal Could Result in Direct Relief in the Federal Case, Namely an Order for the Return of His Daughter

1. An appellate reversal and a favorable judgment on remand would grant Sergeant Chafin meaningful relief. His federal appeal seeks to overturn the district court's erroneous finding that he wrongfully retained E.C. in the United States and its judgment authorizing Mrs. Chafin to remove E.C. from the United States. An appellate reversal could unwind the erroneous return order, resulting in concrete relief: an order to bring back his daughter.

As our opening brief and the government's brief explained, federal courts have inherent equitable authority to rectify erroneous lower court rulings. Pet'r Br. 22; U.S. Br. 15. After reversal of an erroneous judgment, a federal district court may "undo what it had no authority to do originally" and "restore, as far as possible, the parties to their former position." *Nw. Fuel Co.* v. *Brock*, 139 U.S. 216, 219 (1891) (reversing district court's conclusion that it lacked power to order plaintiffs to return payment from defendants); *see also Mills*, 159 U.S. at 654.

The courts of appeals and district courts continue to apply this rule. *E.g.*, *Lyrick Studios, Inc.* v. *Big Idea Prods., Inc.*, 420 F.3d 388, 396-97 (5th Cir. 2005) (remanding for entry of a restitution order to return

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closed his business and sold the premises pending appeal, the case involving the business was not moot.

injunction bond after reversal of a lower court judgment); *Mohamed* v. *Kerr*, 91 F.3d 1124, 1126-27 (8th Cir. 1996) (ordering an attorney to return a contingency fee to the appellant after reversal of the lower court's erroneous judgment); *Caldwell* v. *Puget Sound Elec. Apprenticeship & Training Trust*, 824 F.2d 765, 767 (9th Cir. 1987) (affirming restitution order after reversal of a Title VII money judgment); *PSM Holding Corp.* v. *Nat'l Farm Fin. Corp.*, 743 F. Supp. 2d 1136, 1155 (C.D. Cal. 2010) (ordering restitution of already-enforced money judgment that had been reversed on appeal).

2. Mrs. Chafin does not dispute that both courts of appeals and district courts generally possess this inherent equitable power. Nevertheless she asserts, without citing relevant authority, that a Hague Convention case is mooted by the return of the child because the only remedy provided by the Convention is a return order. Resp't Br. 12-15. But neither the Hague Convention nor the International Child Abduction Remedies Act (ICARA) specifies appellate procedures or related remedies. Both leave such matters of procedure to existing domestic law. U.S. Br. 14. For that reason, Sergeant Chafin does not seek a new remedy of "re-return" under the Hague Convention. *Contra* Resp't Br. 12-13, 45-48. Rather, he asks the federal courts to grant him the traditional remedy of rectifying a previous ruling later found to have been mistaken.

Mrs. Chafin's reading of the Hague Convention and ICARA would disrupt the established statutory right of appeal under 28 U.S.C. § 1291.[6] Neither the Hague Convention nor ICARA explicitly limits the right to appeal once the child has been removed from the country. U.S. Br. 26-27. Nor should they be read as implicitly repealing the right to appeal. If Congress had meant to limit the general right to appeal in Hague Convention cases, it would have done so explicitly. *See Greenlaw* v. *United States*, 554 U.S. 237, 250 (2008); U.S. Br. 27.

Far from limiting the right to appeal, Congress in enacting ICARA envisioned that litigants would remain able to pursue appeals in Hague Convention cases, just as they are allowed to do in most other signatory nations. Pet'r Br. 6-8. U.S. courts expedite Hague Convention appeals, in keeping with the Convention's emphasis on speed. Even the 15% of U.S. Hague Convention cases that are appealed become final in less than fifteen months on average – less than half the time that Mrs. Chafin suggests. NIGEL LOWE, HAGUE CONFERENCE ON PRIVATE INT'L LAW, A STATISTICAL ANALYSIS OF APPLICATIONS MADE IN 2008 UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, PT. III – NATIONAL REPORTS 207 (2011).

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[6] Mrs. Chafin argues that there is no constitutional right to appeal, Resp't Br. 27-28, but Sergeant Chafin has never based his claim or his argument on the existence of any such right.

Mrs. Chafin cites nothing in the Hague Convention or ICARA that requires such a drastic departure from traditional principles of mootness, remedies, and appellate practice and procedure. The Convention obligates signatory nations to decide whether a child has been wrongfully removed or retained. The domestic law of each signatory nation generally determines the procedures under which those determinations are made.

3. The availability of a stay pending appeal is irrelevant to the mootness analysis. Pet'r Br. 43-44. Even if stays were relevant when they are available, they are not always granted. *Id.* at 44-45; Resp't Br. 41-42. Here, Sergeant Chafin sought a stay within minutes of the district court's oral decision. By seeking a stay, he was not "acknowledg[ing] that exit of the child would indeed moot his appeal." Resp't Br. 22. He simply wanted his daughter to remain in the United States with him.

Nor, as a prudential matter, should a stay be necessary to perfect an appeal. Treating the failure to grant a stay as mooting the appeal would provide a strong reason to grant stays in all cases, even though only some would ultimately be reversed. U.S. Br. 25-26. That would undermine the Convention's goal of expeditiously processing return applications and returning children. *See* GUIDE TO GOOD PRACTICE UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, PT. IV – ENFORCEMENT 13 (2010). As the Solicitor General notes, granting a stay also "would keep

the child from what has been found to be her country of habitual residence and would benefit the parent who the district court found to have wrongfully removed or retained the child." U.S. Br. 25.

4. Finally, the district court ordered Sergeant Chafin to pay roughly $94,000 in attorney's fees, court costs, and travel expenses. U.S. Br. 8-9. Appellate review would resolve whether Mrs. Chafin is entitled to this sum. While a dispute over attorney's fees alone is insufficient to keep a case alive, the award here includes travel expenses that are analogous to partial damages, giving the parties a continuing concrete interest in the outcome. *Id.* at 20-21. This is not a mere possibility of a fee award contingent upon success. It is an actual money judgment already entered against a party.

III. Reversal of the District Court's Order Would Influence the Alabama and Scottish Custody Proceedings

Regardless of any federal restitution order, reversal could redress Sergeant Chafin's injuries in the Alabama and Scottish custody proceedings. In addition to permitting Mrs. Chafin to remove E.C. from the country and from Sergeant Chafin's care, the district court's order effectively ended the pending Alabama custody proceedings and allowed Mrs. Chafin to initiate custody proceedings in Scotland. *See* Pet'r Br. 30-31. As a result of that order, Sergeant Chafin must fight for custody of his daughter in

Scotland rather than in Alabama, where he had first sought custody. A reversal of the district court's order would redress this injury. *See* Pet'r Br. 30-36.

1. Hague Convention proceedings determine only the country of habitual residence and whether the child should be returned there. Thus, the Convention's text provides only a "temporary solution" to the parental dispute. Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention (Pérez-Vera Report)*, *in* ACTES ET DOCUMENTS DE LA QUATORZIÉME SESSION, TOME III, at 426, 436 (1982). "[I]t is only after the return of the child to its habitual residence that questions of custody rights will arise before the competent tribunals." *Id.* A final, binding resolution of custody must await a second suit filed in the child's country of habitual residence.

2. A case is not moot where, as here, a judgment may influence pending or imminent proceedings. The matter at issue encompasses the consequences a judgment will have on later litigation necessarily contemplated by the first suit. That is especially true where the subsequent litigation involves the same parties.

Suits for declaratory relief demonstrate that a case remains a live controversy even when the only possible consequence a judgment could have is on future proceedings. The Declaratory Judgment Act allows a plaintiff to sue solely to establish a predicate to further relief. *See* 28 U.S.C. § 2202; *see also Powell* v. *McCormack*, 395 U.S. 486, 498-99, 518 (1969). In

many cases, the initial suit provides no immediate relief, but it presents a live controversy because it has an effect on the second suit.

In *Powell*, Representative Powell alleged that he had been unconstitutionally excluded from the 90th Congress and had been wrongfully denied his salary for that term. 395 U.S. at 495-96. In this Court, the defendants argued that the case was moot because the 90th Congress had already ended and Representative Powell had failed to plead facts sufficient to support an injunction ordering backpay. *Id.* at 495-96, 498.

This Court rejected the claim of mootness. *Powell*, 395 U.S. at 496. Even if no injunction could issue, the claim for a declaratory judgment respecting backpay precluded mootness. *Id.* at 498-99. Although any favorable judgment would be used solely as a predicate to further relief, the "claim [wa]s still unresolved and hotly contested by clearly adverse parties." *Id.* at 498.

When, as in *Powell*, declaratory judgment actions are part of an effort to obtain monetary relief, the litigation strategy frequently depends on a second suit. Recognizing this, this Court in *Green* v. *Mansour* held that the Eleventh Amendment barred a declaratory judgment against the state defendant *because* the plaintiffs could use that ruling as a predicate to relief in later state-court suits. 474 U.S. 64, 72-73 (1985) (finding that a declaratory judgment would be "useful in resolving the dispute . . . only if it might be

offered in state-court proceedings as res judicata on the issue of liability" in order to obtain "damages or restitution"); *see also, e.g.*, *Christopher Vill., Ltd. P'ship* v. *Retsinas*, 190 F.3d 310, 315 (5th Cir. 1999) (finding the litigation not moot because a declaratory judgment against HUD defendants might serve as a predicate in the Court of Federal Claims). *Cf. Hewitt* v. *Helms*, 482 U.S. 753, 763 (1987) (noting that a declaratory judgment regarding a damages claim does "not definitively settle the controversy between the parties") (internal quotation marks omitted). Thus, in *Green*, even though a change in federal law had mooted the plaintiffs' claim for injunctive relief, this Court still entertained the claim for declaratory relief. 474 U.S. at 67-69. Because both the plaintiffs and the state defendant would also be parties to the second suit, both retained a concrete interest in the first one.[7]

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[7] This Court's recent decisions in *Camreta* v. *Greene*, 131 S. Ct. 2020, 2034 (2011), *United States* v. *Juvenile Male*, 131 S. Ct. 2860, 2864 (2011), and *Spencer* v. *Kemna*, 523 U.S. 1, 11-16 (1998), are consistent with this approach. In *Spencer*, this Court refused to presume speculative collateral consequences in remote future litigation that might well never happen if petitioner obeyed the law. 523 U.S. at 14-16. *Camreta* held, and *Juvenile Male* reaffirmed, that a litigant lacks the personal stake required to avoid mootness when his only interest in the suit is a possible effect on potential future litigation. 131 S. Ct. at 2034; 131 S. Ct. at 2864. The *Camreta* Court emphasized that the future suit there (a) was unlikely to occur, as it had been dismissed and a motion to reinstate had been denied, and (b) would be against a different defendant. 131 S. Ct. at 2034. But *Camreta* also held that defendants' appeal of a suit

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A fortiori, a suit's effects on ongoing parallel proceedings between the same parties suffice to keep the controversy alive. *See ConnectU LLC* v. *Zuckerberg*, 522 F.3d 82, 88-89 (1st Cir. 2008) ("There is a recognized defense to a claim of mootness in the appellate context when a party can demonstrate that a lower court's decision, if allowed to stand, may have collateral consequences adverse to its interests."); *Nat'l Iranian Oil Co.* v. *Mapco Int'l, Inc.*, 983 F.2d 485, 490 (3d Cir. 1992) (holding an appeal not moot because the district court's finding that an Iranian statute of limitations was inapplicable would collaterally estop similar proceedings initiated by the same plaintiff in another district).

So too here. The whole point of a Hague Convention proceeding is to lay the foundation for a custody proceeding that will follow. It necessarily contemplates the follow-on custody suit. Here, the other proceedings are already pending in Scotland (and have already been dismissed in Alabama), and Mrs. Chafin is Sergeant Chafin's adversary in both the Hague Convention proceedings and the custody proceedings. A reversal would have "real-world consequences" for the same parties' continuing live dispute. U.S. Br. 19. A favorable judgment for Sergeant Chafin on remand would, at a minimum, declare that E.C.'s

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challenging past actions will often remain justiciable even where official immunity precludes damages in that particular case, "because the judgment may have prospective effect on the parties" in a likely future "damages action." *Id.* at 2029.

habitual residence was in the United States and that Sergeant Chafin did not wrongfully retain her there. It would thus serve as a predicate to further relief in a second suit involving the same two adverse parties continuing the same basic dispute. That would lead the Scottish courts to stay or dismiss their proceedings. *Infra* pp. 17-19. Thus, this case is not moot.

3. It is no answer that the district court's ruling has since been vacated. Resp't Br. 33-34. That argument is circular: the case was vacated based on a finding of mootness, but the correctness of that mootness finding is the very issue here. Mootness is a jurisdictional defect that sometimes justifies the distinct remedy of vacatur, but the fact that a judgment has been vacated as moot does not itself show that the mootness finding was correct. Mootness must be evaluated as of the moment just before the court of appeals rendered its decision; only later did it serve as the basis for vacating the district court's judgment. Pet. App. 1-2.

Reversal of the district court's judgment on the merits would have the concrete effect of changing the traffic signal to red for the Scottish proceedings and green for the Alabama proceedings. That would undo the effect of the district court's judgment. Sergeant Chafin would move to stay the Scottish proceedings and to reopen the Alabama custody suit, because the "prior judgment upon which it is based has been reversed." ALA. R. CIV. P. 60(b)(5). He could plead the revised habitual-residence finding in his favor, invoking

collateral estoppel (which Scots law treats as a component of res judicata). Pet'r Br. 40-41.

4. Here, the federal determinations of E.C.'s country of habitual residence and the wrongfulness of her retention or removal would have preclusive effect. *See* Pet'r Br. 30-36. They would determine what the status quo ante was and thus influence the determination of the best interests of the child. *See id.* at 41. In Alabama, the UCCJEA requires recognition and enforcement of Hague Convention determinations. UCCJEA §§ 302, 303, 313 (codified at ALA. CODE ANN. §§ 30-3B-302, 30-3B-303, 30-3B-313 (1975)); Pet'r Br. 31-32. Scots law likewise requires enforcement of foreign court orders "relating to parental responsibilities or parental rights," which include Hague Convention determinations. Family Law Act, 1986, c. 55, § 26(1) (U.K.) (as amended); Pet'r Br. 34.[8] Regardless

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[8] Without citing authority, *amicus* Centre for Family Law and Practice (CFLP) argues that a Hague Convention ruling in this case would not qualify under Section 26 as an order "relating to parental responsibilities or parental rights." CFLP *Amicus* Br. 11. Section 42 of the same act, however, defines "parental right" as it is defined in the Children (Scotland) Act 1995. Family Law Act 1986, c. 55, § 42(1) (U.K.). Section 2(1) of the 1995 Act lists among parental rights the right "to have the child living with him or otherwise to regulate the child's residence." Children (Scotland) Act 1995, c. 36, § 2(1)(a) (Scot.). The district court's order allowing E.C.'s return to Scotland interfered with Sergeant Chafin's right to have E.C. continue living with him. It also prevented Sergeant Chafin from barring his daughter's departure from this country. Thus, the order effectively stripped him of his ability "to regulate the child's residence."

of whether Scottish courts would formally recognize and enforce it, a federal judgment would at least carry weight and merit deference as a matter of comity. Pet'r Br. 34-43.

Indeed, both the Alabama and Scottish courts took the Hague Convention proceedings into account in this case. Relying on the deference accorded to federal judgments, Mrs. Chafin pleaded the federal determination of wrongful retention to block the Alabama custody suit and as a predicate to the Scottish suit. She did so precisely because the federal judgment would determine the course of the other courts' proceedings. *See* Pet'r Br. 30-43. If the court of appeals reversed the district court on this point, it (or the district court) could enter an order requiring E.C. to be brought back to the United States. In addition, Sergeant Chafin could also file his own Hague Convention petition in Scotland, based on the determination that E.C. habitually resided in the United States and that Mrs. Chafin's removal of E.C. from the United States was thus wrongful.[9]

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[9] Sergeant Chafin contends that the district court's ruling rested on an erroneous premise as to E.C.'s habitual residence. An appellate reversal would undercut that premise and determine that Mrs. Chafin's removal of E.C. was in fact wrongful. *Contra* CFLP *Amicus* Br. 12. "Wrongful" removal is a defined term of art under the Convention. It does not refer to the remover's mental blameworthiness, but rather depends on which parent in fact had rights of custody in the country of habitual residence. Hague Convention art. 3, App. 2a; Pet'r Br. 42-43. *Cf. Diorinou* v. *Mezitis*, 237 F.3d 133, 142-43 (2d Cir.

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5. Finally, allowing appeals to proceed minimizes the uncertainty and friction caused by parallel litigation in multiple countries, a concern Mrs. Chafin raises. Resp't Br. 50. She acknowledges that "such difficulties" are somewhat inevitable and "cannot be legislated out of existence." *Id.* The best solution is "a clear set of rules on jurisdiction" that cannot be gamed. *Id.*

Mrs. Chafin's approach, however, invites the very "chaos, forum shopping, and snatch-and-grab custody" that she decries and that the Convention seeks to prevent. Resp't Br. 52. Every foreign parent would have an incentive to remove her child from the United States to seek a more favorable venue if doing so would moot proceedings or judgments that could be decided against them. Foreign parents who won at trial would have every incentive to leave quickly and moot their cases before their favorable judgments could be reversed on appeal. Treating such cases as moot would thus subvert the Convention's purpose: to deter child removal by refusing to let a removing parent dictate the venue. *Pérez-Vera Report* at 444-45; Pet'r Br. 4.

Conversely, allowing appeals to proceed in the usual course undercuts the incentive to abduct a

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2001) (declining to treat Greek adjudication of wrongfulness as preclusive of later reexamination, but "careful[ly] consider[ing]" an earlier court's findings on the merits and ultimately "defer[ring] as a matter of [international] comity").

child. It establishes a clear rule, allowing the first jurisdiction to complete its proceedings and serve as a traffic signal to other jurisdictions. And it prevents parents from gaming that rule before the process is complete.[10]

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[10] Mrs. Chafin cites the Fifth Circuit's decision in the *Larbie* case as supposedly demonstrating that Hague Convention appeals can lead to a "comity maelstrom." Resp't Br. 54; *see also id.* at 52 (citing *Larbie* v. *Larbie*, 690 F.3d 295 (5th Cir. 2012), *pet. for cert. filed* (Sept. 7, 2012) (No. 12-304)). Actually, *Larbie* illustrates international judicial comity as envisioned by the Convention.

In *Larbie*, a Texas judge entered temporary divorce, custody, and visitation orders just before the American father was sent overseas on military service. The British mother then departed for London with the child, supposedly temporarily. While there, she refused to comply with the temporary custody order. *Larbie*, 690 F.3d at 299-300. The father sought enforcement in the United Kingdom. (Mrs. Chafin erroneously claims that Mr. Larbie "unequivocally concede[d]" exclusive jurisdiction in the United Kingdom. *Compare* Resp't Br. 53, *with* Pet. for Writ of Certiorari (*Larbie* Pet.) App. 54, 59, 66, 72, 78, 82, *Larbie* v. *Larbie*, No. 12-304 (filed Sept. 7, 2012)). A U.K. family court entered a visitation order on the same terms as the Texas order, and a U.K. immigration official refused to grant the child permanent residence because custody proceedings were ongoing in Texas. *Id.* at 300. After the Texas court imposed sanctions on the mother for failing to comply with discovery, the mother complied with the sanctions order and an order to bring the child back to the United States for a trial. *Id.* at 303-04. After the Hague Convention action was filed and appealed in the United States, the U.K. family court scheduled a hearing to consider the effect of the Fifth Circuit's ruling on the U.K. case. *Larbie* Pet. App. 86, 88. In short, *Larbie* demonstrates comity at work.

CONCLUSION

For the foregoing reasons, as well as for the reasons stated in Sergeant Chafin's opening brief, this Court should reverse the judgment of the Eleventh Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-1347

In the Supreme Court of the United States

JEFFREY LEE CHAFIN, PETITIONER

v.

LYNNE HALES CHAFIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether an appeal of a district court order under the Hague Convention on the Civil Aspects of International Child Abduction, providing for return of a child to the country of the child's habitual residence, becomes moot if the child is returned pending appeal.

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In the Supreme Court of the United States

No. 11-1347

JEFFREY LEE CHAFIN, PETITIONER

v.

LYNNE HALES CHAFIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The question presented in this case is whether an appeal of a district court order to return a child under the Hague Convention on the Civil Aspects of International Child Abduction becomes moot if the child is returned pending appeal. The United States is a party to the Convention, and the Department of State is the designated Central Authority that coordinates with other States and assists in the Convention's implementation in the United States. Accordingly, the United States has a substantial interest in the manner in which the Convention is interpreted by the courts of this country.

STATEMENT

1. a. The Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention or Convention) was adopted in 1980 to address the growing

problem of international child abduction by persons involved in child-custody disputes. *Hague International Child Abduction Convention; Text and Legal Analysis (Convention Text and Legal Analysis)*, 51 Fed. Reg. 10,498 (1986); see Hague Convention, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89.[1] The Convention's purposes are to "secure the prompt return of children wrongfully removed to or retained in any Contracting State" and to "ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Art. 1. To achieve these purposes, the Convention establishes uniform legal standards and remedies to be employed by States Parties when a child is removed from one country to another. See 42 U.S.C. 11601(a); see also Convention Introductory decls., Art. 1.

The Convention provides that any child under age 16 who is "wrongfully removed or retained" in a contracting State, in violation of a parent's or other person's custody rights, shall be promptly returned to the country of the child's habitual residence. See Convention Arts. 1(a), 4. Removal or retention is "wrongful[]" if: first, it is "in breach of rights of custody attributed to a person, * * * either jointly or alone," under the law of "the State in which the child was habitually resident," and second, "[a]t the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." Art. 3.

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[1] The English-language text of the Convention is reprinted at 51 Fed. Reg. at 10,498-10,502, together with an analysis prepared by the Department of State and submitted to the Senate Committee on Foreign Relations in connection with the Senate's consideration of the Convention. See *id.* at 10,494, 10,503-10,516.

Upon finding that a parent has wrongfully removed or retained a child—*i.e.*, that the parent has violated the custody rights of the other, "left-behind" parent—authorities in the State in which the child is present must, subject to certain defenses, "order the return of the child forthwith." Convention Art. 12. "This right of return is the core of the Convention." *Convention Text and Legal Analysis*, 51 Fed. Reg. at 10,507. It is designed to "protect children internationally from the harmful effects of their wrongful removal or retention" by quickly restoring them to their established family and social networks. See Convention Introductory decls.; 51 Fed. Reg. at 10,504. The Convention provides that courts shall "act expeditiously" in adjudicating petitions for return of children. Art. 11.

The Convention's return remedy reflects two important principles: custody determinations should be made by the courts in the child's country of habitual residence, and an abducting parent should gain no legal advantage from attempting unilaterally to change the forum. See Elisa Perez-Vera, *Explanatory Report*, in 3 *Actes et Documents de la Quatorzieme Session (Child Abduction)* 426, paras. 16, 19, at 429-430 (Permanent Bureau trans. 1982) (*Explanatory Report*); 51 Fed. Reg. at 10,498. The inquiry before a court considering a Hague Convention petition is limited to whether the child was wrongfully removed from or retained in a contracting State (see Convention Art. 12) and whether any of the exceptions to return apply (see Art. 13). The court does not decide custody, and any decision concerning return "shall not be taken to be a determination on the merits of any custody issue." Arts. 16-17, 19. Thus, the Convention "simply restores the pre-abduction status quo by allowing for the return of a wrongfully ab-

ducted child," leaving custody disputes to be resolved by the courts in the country of the child's habitual residence. *Von Kennel Gaudin* v. *Remis*, 282 F.3d 1178, 1182 (9th Cir. 2002).

The United States participated in the negotiation of the Convention's terms, see *Members of the First Commission, Proces-verbaux et Documents de travail de la Premiere commission*, in 3 *Actes et Documents*, at 253-255, and the Convention entered into force for the United States in 1988. See T.I.A.S. No. 11,670, *supra*.

b. Congress enacted the International Child Abduction Remedies Act (ICARA), 42 U.S.C. 11601 *et seq.*, to implement the Hague Convention. In doing so, Congress found that the "international abduction or wrongful retention of children is harmful to their well-being," 42 U.S.C. 11601(a)(1), and it concluded that the Convention "provides a sound treaty framework to help resolve th[at] problem," 42 U.S.C. 11601(a)(4). ICARA supplements the provisions of the Convention by "establish[ing] procedures for the implementation of the Convention in the United States." 42 U.S.C. 11601(b)(1); see 42 U.S.C. 11601(b)(2).

ICARA authorizes a person seeking return of a child under the Convention to file suit in any state or federal court that has jurisdiction of the action and "is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed." 42 U.S.C. 11603(a) and (b). The court "shall decide the case in accordance with the Convention," 42 U.S.C. 11603(d), and shall not decide "the merits of any underlying child custody claims," 42 U.S.C. 11601(b)(4). A child found to have been wrongfully removed or retained must be "promptly returned," unless the party opposing return establishes the applicability of one of the Convention's

"narrow exceptions." 42 U.S.C. 11601(a)(4), 11603(e)(2). If the court orders return of the child, it must order the party opposing return to pay "necessary expenses incurred by or on behalf of" the person seeking return, including court costs, legal fees, and transportation costs related to return, unless the party opposing return establishes that such an order would be "clearly inappropriate." 42 U.S.C. 11607(b)(3).

ICARA provides that the President shall designate a Central Authority for the United States. 42 U.S.C. 11606(a). Central Authorities are responsible for "promot[ing] co-operation amongst the competent authorities in their respective States" and "tak[ing] all appropriate measures" to perform various functions, including facilitating voluntary returns and providing legal and investigative resources. Convention Art. 7. The Office of Children's Issues in the Bureau of Consular Affairs in the State Department is the U.S. Central Authority. See 22 C.F.R. 94.2.

c. In the United States, interstate child abduction is addressed by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), 9 U.L.A. 657 (1999).[2] Under the UCCJEA, a state court that makes an initial custody determination maintains exclusive and continuing jurisdiction over that determination until the child and his or her parents lack a sufficient connection to the State. §§ 201-202, 9 U.L.A. 671-674. The UCCJEA attempts to deter interstate child abduction by providing that courts generally must recognize and enforce existing custody and visitation decrees entered in other jurisdictions, including foreign jurisdictions. §§ 105, 303,

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[2] The UCCJEA has been adopted by 49 States, the District of Columbia, Guam, and the U.S. Virgin Islands. See UCCJEA introductory note, 9 U.L.A. 114-115 (Supp. 2012).

9 U.L.A. 662, 690-691. The UCCJEA also provides that courts may enforce a Hague Convention return order "as if it were a child-custody determination." § 302, 9 U.L.A. 690.

2. Petitioner, a United States citizen, married respondent, a citizen of the United Kingdom, in 2006. 1 10/11/2011 Trial Tr. 37 (5:11-CV-01461 Docket entry No. 32) (Tr.); Pet. Br. 8. Their child was born in Germany the following year. 1 Tr. 34; Pet. Br. 8. Petitioner, who was serving in the United States Army, then was deployed to Afghanistan. 1 Tr. 38; Pet. Br. 8. In August 2007, respondent and the child moved to Scotland with petitioner's consent. 1 Tr. 38-42, 44-46.

Petitioner was transferred to Huntsville, Alabama in 2009. 2 Tr. 71-72. In February 2010, respondent and the child traveled to Alabama in an effort to salvage the parties' marriage. Pet. App. 5. Respondent entered the United States on a 90-day visitor's visa, with a return ticket to Scotland. *Id.* at 7. She maintained her rental home in Scotland, and the child was scheduled to begin nursery school there in April. *Ibid.*; 1 Tr. 51-52.

By April 2010, the parties had agreed to end their marriage. Pet. App. 8. When respondent and the child were preparing to leave for Scotland in May 2010, petitioner filed divorce papers and an emergency child custody petition in Alabama state court. *Ibid.*

Respondent and the child remained in Alabama with petitioner until December 2010. Pet. App. 8. At that point, respondent was placed into removal proceedings because her visitor's visa had expired. *Ibid.* In February 2011, respondent was removed from the United States to the United Kingdom. 1 Tr. 118, 268. The child remained in the United States with petitioner. 2 Tr. 203-206.

3. Respondent filed suit in federal district court to obtain return of the child to Scotland under the Hague Convention. She contended that the child's habitual residence was in Scotland and that petitioner had wrongfully retained the child in the United States starting in May 2010. Pet. App. 3-5; see Verified Pet. for Return of Child 2-7 (May 2, 2011) (5:11-CV-01461 Docket entry No. 1).

After a bench trial, the district court agreed with respondent that the child should be returned to Scotland. Pet. App. 3-12. The court noted the parties' agreement that, "until February 2010, [they] intended the child's habitual residence to be in Scotland." *Id.* at 5 n.2. The district court then concluded that the parties' trial period together in the United States between February and April 2010 did not change the child's habitual residence. *Id.* at 5-6. The district court found that in May 2010, petitioner removed the child's U.S. and British passports from their customary location, essentially "prohibit[ing] [respondent] from leaving the country with the child." *Id.* at 9. The district court further found that respondent "decided to return to Scotland with the child in early May, 2010," and that she would have done so but for petitioner's serving her with emergency divorce and custody papers and taking the child's passports. *Id.* at 6, 8-9. The district court then rejected petitioner's affirmative defenses to return. *Id.* at 10-12. Having concluded that respondent established a right to return under the Convention, the district court entered an order permitting respondent to return with the child to Scotland, "for appropriate custody proceedings to commence there." *Id.* at 12.

The district court granted the Hague Convention petition in an oral ruling, which was later memorialized in

a written decision. 2 Tr. 261, 264-266; see Pet. App. 12. Petitioner immediately sought a stay. See Resp. Mot. to Stay Implementation of Order (Oct. 12, 2011) (5:11-CV-01461 Docket entry No. 29). The court denied the stay motion, stating that respondent "is permitted to return to Scotland this day with her minor child." Pet. App. 13. Respondent and the child left the United States that day. Pet. Br. 11.

4. Petitioner appealed. Respondent moved to dismiss the appeal on the ground that the case was moot. Mot. to Dismiss Appeal 5-9 (Dec. 6, 2011).

In a brief order, the court of appeals granted the motion to dismiss the appeal and remanded the case to the district court with directions to vacate its return order and dismiss the case as moot. Pet. App. 1-2. In support of that conclusion, the court of appeals cited *Bekier* v. *Bekier*, 248 F.3d 1051 (11th Cir. 2001). In *Bekier*, the district court entered a Hague Convention order allowing a child to return to Israel with his father; the child returned to Israel; the mother appealed, but did not secure a stay; and the court held that the case was moot. *Id.* at 1053 & n.2. The court of appeals reasoned that even if the mother prevailed on appeal, she could obtain "no actual affirmative relief" because the child "ha[d] already returned to Israel." *Id.* at 1054. In the court of appeals' view, the mother's "potential remedies" would be "in the Israeli courts." *Ibid.*

5. On remand, the district court in this case vacated its earlier return order and dismissed the action. Pet. App. 15. The court also entered two orders requiring petitioner to pay respondent a total of approximately $94,000 for her attorney's fees, court costs, and travel expenses. 3/7/2012 Order 15-16 (5:11-CV-01461 Docket

entry No. 50); 6/5/2012 Order 2 (5:11-CV-01461 Docket entry No. 59); see 42 U.S.C. 11607(b)(3).

6. After the court of appeals' decision, there were further developments in child-custody proceedings in both the United States and the United Kingdom.

a. The Alabama state court had stayed the parties' divorce and custody case pending resolution of the Hague Convention case. See *Chafin* v. *Chafin*, No. 2110421, 2012 WL 3055522, at *1 (Ala. Civ. App. July 27, 2012). After respondent obtained the return order, she sought dismissal of the Alabama state case, and the trial court dismissed the case for lack of jurisdiction. *Id.* at *2. The state appellate court agreed that the state courts now lacked jurisdiction over the child-custody portion of the proceeding. See *id.* at *4. The court explained that it could not decide child custody under the UCCJEA because the Hague Convention order established that "the child's 'home state' was Scotland." *Ibid.*

b. In December 2011, respondent filed a child-custody action in Scotland. Her complaint recounted the Hague Convention proceedings in the United States and requested that the court grant her temporary custody of the child and enter an order preventing petitioner from removing the child from Scotland. Initial Writ at 2-8, *Hales* v. *Chafin*, No. F544/11 (Sheriffdom of S. Strathclyde, Dumfries & Galloway at Airdrie Dec. 21, 2011) (Writ). The Scottish court entered an interim order granting the requested relief. Form of Warrant of Citation in Family Action at 1-2, No. F544/11 (Dec. 22, 201[1]) (Warrant); see Pet. Br. 12. The Scottish court apparently has not taken any further action to resolve the child-custody dispute. See *id.* at 12-13.

SUMMARY OF ARGUMENT

The return of a child in accordance with a Hague Convention return order issued by a federal district court does not moot an appeal of that order.

A. Under Article III of the Constitution, a case becomes moot when there is no longer a live, concrete dispute between the parties or when the court could not provide any effectual relief to a prevailing party. In this case, the parties have an ongoing dispute about which country is their child's place of habitual residence. They have not settled that dispute, and they have filed related custody proceedings in both the United States and the United Kingdom. The mootness issue depends on whether the courts of the United States could grant effectual relief to the prevailing party or otherwise affect a matter in issue between the parties.

B. Appellate resolution of this case could have a number of real-world consequences for both parties. If petitioner prevailed on appeal, he could seek an order requiring respondent to bring the child back to the United States and could seek recognition of that judgment in UK courts. Although respondent's presence outside the United States may complicate enforcement of such an order, that does not render the case moot. An appellate decision in petitioner's favor also would remove legal barriers to adjudication of custody in the United States and would remove the basis for the district court's award of fees and costs.

On the other hand, if respondent prevailed on appeal, she would have a final judgment holding that the child's habitual residence is in the United Kingdom and no defenses to return apply, and she could ask the court in her custody case in the United Kingdom to take notice of that judgment. Affirmance of the return order also

would affirm respondent's entitlement to fees and costs under ICARA.

C. The Convention's history and purposes support the conclusion that this case is not moot. The Convention's central object is to secure the prompt return of children to their countries of habitual residence. Under the court of appeals' rule, a district court either would have to grant a stay—thereby keeping the child in a country found not to be her habitual residence—or allow the child to return and cut off one parent's appellate rights. The Convention contemplates prompt return; neither the Convention nor ICARA requires curtailing appellate rights if the child is returned; and eliminating one parent's right to appeal would be inconsistent with the history of ICARA and the general rule permitting an appeal as of right in the United States. The United States is aware of only one foreign court of last resort—the Spanish Constitutional Court—that has directly addressed the mootness question, and that court held that return of the child did not moot the case. The judgment of the court of appeals should be reversed and the case remanded for adjudication on the merits.

ARGUMENT

RETURN OF A CHILD IN CONFORMITY WITH A DISTRICT COURT'S ORDER UNDER THE HAGUE CONVENTION DOES NOT MOOT AN APPEAL OF THE RETURN ORDER

The question in this case is whether an appeal of a Hague Convention return order is rendered moot when the child is returned in accordance with the order. This case is not moot under Article III of the Constitution because there remains a live dispute between the parties, and appellate resolution of that dispute would have concrete consequences for the parties. Moreover, the Convention's history and purposes suggest that prompt

return of a child to her habitual residence should not moot the opposing parent's appeal of the return order. The United States expresses no views on the merits of the underlying Hague Convention petition. But this case is not moot.

A. Whether This Case Is Moot Depends On Whether There Is A Live Controversy The Resolution Of Which Would Have Real-World Consequences For The Parties

1. Article III of the Constitution grants the Judicial Branch the authority to adjudicate "Cases" and "Controversies." U.S. Const. Art. III, § 2. A federal court may not "give opinions upon moot questions or abstract propositions," or "declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992) (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)). There must be an "actual controversy" between the parties "at the time the complaint is filed" and at "all stages" of the case. *Alvarez* v. *Smith*, 130 S. Ct. 576, 580 (2009); see *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) ("This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate.").

A case becomes moot when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," *Murphy* v. *Hunt*, 455 U.S. 478, 481 (1982) (per curiam) (internal quotation marks omitted), or when an event occurs while the case is pending "that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party." *Church of Scientology*, 506 U.S. at 12 (quoting *Mills*, 159 U.S. at 653). If appellate resolution of the case would not "affect the matter in issue," then the case is moot. *Ibid.*

2. In a Hague Convention case, a court's charge is limited: the court is to decide only whether one parent has wrongfully removed the child to, or retained the child in, a country that is not her habitual residence and if so, whether any exception to return applies. Convention Arts. 3, 5, 12-13.

Here, respondent sought return of the child to the United Kingdom under the Hague Convention. The federal district court held a two-day bench trial, concluded that petitioner had wrongfully retained the child in the United States because Scotland is the child's habitual residence, and entered an order permitting respondent to return to Scotland with the child. Pet. App. 12. Petitioner sought a stay of that order, which was denied, *id.* at 13, and respondent immediately left for Scotland with the child. Petitioner appealed the return order. Respondent and the child have remained in Scotland, and respondent initiated child-custody proceedings there. See Writ 1-8. In the Alabama proceedings, the state appellate court determined that the trial court had lost jurisdiction to adjudicate child custody because, under the federal court's Hague Convention ruling, the child's country of habitual residence is the United Kingdom. See *Chafin* v. *Chafin*, No. 2110421, 2012 WL 3055522, at *4 (Ala. Civ. App. July 27, 2012).

At this point, it is plain that the parties still have a real-world dispute about where the child should reside. The parties disagree about whether the child's habitual residence changed from the United Kingdom to the United States when respondent and the child came to live in Alabama in February 2010 and whether, if the child's habitual residence remained in Scotland, any defenses to return might apply. Compare Pet. Br. 8-10 with Br. in Opp. 2-5. Accordingly, "notwithstanding the

return of the child, the issue as to whether the initial [retention of the child] was wrongful [is] still very much alive." *Whiting* v. *Krassner*, 391 F.3d 540, 545 (3d Cir. 2004), cert. denied, 545 U.S. 1131 (2005). Further, the parties' ongoing child-custody dispute, while addressing an issue distinct from whether return is required under the Convention, underscores that the parties have maintained the type of "concrete adverseness" and "personal stake in the outcome" required for Article III purposes. *City of L.A.* v. *Lyons*, 461 U.S. 95, 101 (1983) (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)).

The mootness issue in this case therefore depends on whether the court of appeals could "grant 'any effectual relief whatever' to a prevailing party" or otherwise "affect the matter that remains in issue" between the parties. *Church of Scientology*, 506 U.S. at 12 (quoting *Mills*, 159 U.S. at 653). As explained below, the court of appeals could provide relief to the prevailing party, and appellate resolution of the dispute likely would have a number of real-world consequences for both parties.

B. This Case Is Not Moot Because A Federal Appellate Court's Order Could Have Concrete Consequences For The Parties

1. The primary remedy envisioned by the Convention—return of the child—has occurred. The Convention does not address what should happen if a return order is overturned on appeal after the child has left the jurisdiction; instead, it leaves that issue (and most procedural questions) to the domestic law of each State Party. ICARA, the Convention's implementing statute in the United States, likewise does not address what might happen if a return order is overturned on appeal. But under general principles that are presumptively ap-

plicable in this setting, the courts can afford petitioner relief if he prevails on appeal.

This Court has long recognized that "so long as [the court] retains control of the subject-matter and of the parties," it has inherent "equitable powers" to "correct that which has been wrongfully done by virtue of its process." *Arkadelphia Milling Co.* v. *St. Louis Sw. Ry.*, 249 U.S. 134, 145-146 (1919); see, *e.g.*, *Federal Power Comm'n* v. *Interstate Natural Gas Co.*, 336 U.S. 577, 582-583 (1949); *Public Serv. Comm'n* v. *Brashear Freight Lines, Inc.*, 312 U.S. 621, 628-630 (1941); *Northwestern Fuel Co.* v. *Brock*, 139 U.S. 216, 219 (1891). The court's equitable authority extends to compelling a party properly before it to perform an act outside its territorial jurisdiction. See *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 287 (1952).

When respondent filed suit in federal district court, seeking a return order under the Hague Convention, she submitted herself to the jurisdiction of that court. The court may continue to exercise personal jurisdiction over her despite the fact that she is outside its territorial jurisdiction. See *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451-452 (1932); see also, *e.g.*, *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). If the court of appeals concluded that the district court's return order was erroneous because the United States was the country of the child's habitual residence, it could reverse the district court's decision and order respondent to bring the child back to the United States. See, *e.g.*, *Larbie* v. *Larbie*, 5:11-CV-00160 Docket entry No. 60, at 2 (W.D. Tex. Aug. 29, 2012) (order directing parties to "immediately comply with the Fifth Circuit's judgment" by "re-

turn[ing] K.L. to the United States" and "to the custody of [the parent who prevailed on appeal]").

If the court of appeals (or the district court on remand) orders a non-resident parent to bring a child back to the United States, the parent might voluntarily comply with that order. *Larbie* v. *Larbie*, 690 F.3d 295, 305 (5th Cir. 2012), petition for cert. pending, No. 12-304 (filed Sept. 7, 2012). If the non-resident parent declines to comply, enforcement of such an order may be complicated, but that does not make enforcement impossible. See *Knox* v. *Service Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) ("A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." (internal quotation marks omitted)). The district court could impose contempt sanctions. *Larbie*, 690 F.3d at 305; see *Leman*, 284 U.S. at 452 ("contempt of the court" is "none the less contempt because the act was committed outside the district"; "the contempt lay in the fact, not in the place, of the disobedience to the requirement"). That contempt order could be enforced if the non-resident parent returned to the United States.

Moreover, a party who succeeds in obtaining a judgment on appeal reversing a return order could bring that decision to the attention of a foreign court. The foreign court's response would depend on that country's domestic law regarding recognition and enforcement of foreign judgments. Neither the Hague Convention itself nor the UK statute implementing the Convention specifically provides for enforcement of foreign Hague Convention decisions. See Child Abduction and Custody Act 1985, ch. 60, Pt. I, §§ 1-11 (UK) (available at

www.legislation.gov.uk/ukpga/1985/60).[3] But if petitioner filed a new Hague Convention petition in the United Kingdom and sought recognition of the U.S. judgment, a UK court might give effect to it as a matter of comity, or at least apply preclusion principles with respect to certain issues. See 1 Dicey, Morris & Collins, *The Conflict of Laws*, R. 35(2) & cmt., at 575-576 (14th ed. 2006) (*Conflict of Laws*) (identifying circumstances in which UK courts might recognize certain foreign judgments); cf. *Hilton* v. *Guyot*, 159 U.S. 113, 164 (1895) (describing circumstances under which U.S. courts might recognize foreign judgments as a matter of international comity).[4]

There likewise could be consequences under the Convention if respondent prevailed on appeal. After concluding that petitioner's appeal was moot, the court of

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[3] Some courts have mistakenly read the UK Act to require courts in that country to recognize a foreign Hague Convention judgment. See, *e.g.*, *Fawcett* v. *McRoberts*, 326 F.3d 491, 496-497 (4th Cir. 2003), abrogated on other grounds by *Abbott* v. *Abbott*, 130 S. Ct. 1983 (2010). The mistake stems from reading "the Convention" in Section 15 of the UK Act to refer to the Hague Convention when the phrase actually refers to a European treaty regarding recognition of child-custody decisions. See Act, ch. 60, Pt. II, §§ 12, 15.

Nonetheless, the UK Act appears to contemplate that one State will take account of another State's Hague Convention decision, because the Act authorizes a UK court to provide an authenticated copy of its return order when a Hague Convention case is filed in another contracting state. See Act, ch. 60, Pt. II, § 10(2)(d).

[4] The Convention contemplates affording this type of respect to foreign judgments, because it provides that, before ordering return, a judicial or administrative authority may request a determination from the State of the child's habitual residence that the child's removal from that State was wrongful. Art. 15. The Convention also states that a court should look to and "take account of the reasons for" a foreign custody decision in adjudicating a return petition. Art. 17.

appeals vacated the district court's return order. Pet. App. 1-2; see *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). That disposition "strip[ped] the decision below of its binding effect," *Deakins* v. *Monaghan*, 484 U.S. 193, 200 (1988), so that respondent was left with no court order establishing that the child's habitual residence was in the United Kingdom and that no defenses to return applied. By contrast, affirmance of the return order would provide respondent with a judgment she could invoke against petitioner if she and the child returned to the United States, and that she could bring to a UK court's attention and rely upon if petitioner filed a Hague Convention petition there.

2. Appellate resolution of the parties' Hague Convention dispute likely would also have consequences in their ongoing child-custody proceedings. The Hague Convention is not itself a mechanism for litigating child-custody issues; a court considering a Hague Convention petition may not decide custody and the court's decision "shall not be taken to be a determination on the merits of any custody issue." Convention Arts. 16-17, 19. Nonetheless, once the court decides the child's habitual residence in adjudicating the Hague Convention petition, the courts of the country of habitual residence may adjudicate custody under their domestic law.

If petitioner prevailed in this case on appeal, that ruling would remove a legal barrier to adjudication of custody in the United States. Petitioner filed divorce and child custody proceedings in Alabama state court, and then respondent filed a Hague Convention petition. The state court stayed its custody proceedings, because once judicial or administrative authorities in a contracting State receive notice that the child has been wrongfully removed or retained, they "shall not decide on the mer-

its of rights of custody until it has been determined that the child is not to be returned under this Convention" or an application seeking return of the child is not lodged within a reasonable time. Convention Art. 16. After the federal district court entered its return order, the state appellate court determined that petitioner's child-custody case could no longer be litigated in Alabama by virtue of the UCCJEA. See *Chafin*, 2012 WL 3055522, at *4. Under the UCCJEA, a state court may not exercise its jurisdiction to make a child-custody determination when the child's home State is elsewhere and a court in that State has jurisdiction to adjudicate custody. See UCCJEA § 201(a), 9 U.L.A. 671 (codified in relevant part at Ala. Code § 30-3B-102(4) (LexisNexis 2011)).[5]

If the return order were overturned on appeal, it would remove the Hague Convention barrier to adjudication of custody in the Alabama courts, and petitioner could ask the Alabama courts to take account of the federal district court's findings in deciding custody. If petitioner instead chose to submit to litigation of custody in the Scottish courts, he would no longer have the disadvantage of the U.S. court order finding him to have wrongfully retained the child.

There would likewise be real-world consequences in the custody dispute if respondent prevailed on appeal.

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[5] The "home state" under the UCCJEA is not necessarily the same as the child's "habitual residence" under the Hague Convention. See UCCJEA § 102(7), 9 U.L.A. 122 (Supp. 2012) (defining child's "home state" as "the State in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding"). In this case, the Alabama appellate court concluded that the child's home state is Scotland based on findings the district court had made in discerning her habitual residence. See 2002 WL 3055522, at *4.

Although the Scottish court entered an initial order granting respondent temporary custody, see Warrant at 1-2, that court has not taken any further action with respect to the custody dispute, perhaps because that court is awaiting the U.S. courts' final resolution of this case. If the return order were affirmed, respondent might rely on the finding that petitioner wrongfully retained the child in violation of her custody rights to support her request for custody. See Writ at 2-8 (relying on district court's findings in writ seeking temporary custody). Moreover, she could ask the Scottish court to give weight to the district court's findings, as a matter of international comity, as it further adjudicates the custody dispute. See *Conflict of Laws*, R. 35(2) & cmt., at 575-576. And, of course, affirmance of the district court's order would make it unlikely that respondent would have to litigate custody in the Alabama courts. See UCCJEA § 201, 9 U.L.A. 671.

3. Finally, appellate resolution of this case would resolve the status of the judgment that has been entered against petitioner for fees and expenses. ICARA provides that, when a court orders the return of a child, the court "shall order" the parent who wrongfully removed or retained the child to pay "necessary expenses incurred by or on behalf of" the other parent, including "court costs," "legal fees," "foster home or other care during the course of proceedings," and "transportation costs related to the return of the child," unless the abducting parent establishes that such an award "would be clearly inappropriate." 42 U.S.C. 11607(b)(3).

The district court in this case entered a substantial award of fees and expenses to respondent. See pp. 8-9, *supra*. If the district court's return order were reversed on appeal, it would terminate respondent's entitlement

to those amounts under ICARA.[6] Conversely, if the return order were affirmed on appeal, respondent would retain her entitlement to payment of those amounts. Although it is well-established that a contingent "interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim," *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) (internal quotation marks omitted), here the monetary award extends far beyond attorney's fees. The financial consequences of an appellate decision provide yet another reason why this case is not moot. Cf. *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 313-318 (1999).

4. The court of appeals apparently based its mootness holding on a concern about practical obstacles to enforcing a judgment against a non-resident parent. See Pet. App. 1-2 (citing *Bekier* v. *Bekier*, 248 F.3d 1051, 1054-1055 (11th Cir. 2001)). But difficulties in enforcement do not render a case moot. See *Church of Scientology*, 506 U.S. at 12-13 (test for mootness is not whether a court can "return the parties to the *status quo ante*" or grant a "fully satisfactory remedy" to undo the effect of an erroneously entered injunction, but whether some remedy is "possible"); *Ratner* v. *Sioux Natural Gas Corp.*, 770 F.2d 512, 516 (5th Cir. 1985) ("Difficulties in formulating a remedy in an otherwise living case do not

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[6] The district court entered the fees and expenses orders after the court of appeals had found the case moot, and petitioner did not appeal those orders. Nonetheless, petitioner could argue that this Court's reversal of the court of appeals' decision would unwind the proceedings on remand to the district court and allow vacatur of the fees and expenses orders. See *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983).

evidence the absence of a case or controversy).[7] And here, quite aside from any questions concerning direct enforcement of such a judgment, its legal rulings might be given effect in other proceedings.

There are various events that plainly would moot a Hague Convention case on appeal. For example, there would be no dispute about return of the child if the child's age rendered the Convention no longer applicable, Convention Art. 4 (Convention "cease[s] to apply" when child turns 16); see *Gaudin* v. *Remis*, 334 Fed. Appx. 133 (9th Cir. 2009), cert. denied, 131 S. Ct. 109 (2010) (unpublished); see also *Camreta* v. *Greene*, 131 S. Ct. 2020, 2034 (2011) (case moot when child "is no longer in need of any protection from the challenged practice"), or the child died, see *Slagenweit* v. *Slagenweit*, 63 F.3d 719 (8th Cir. 1995). The case also would become moot if the parties conclusively settled their dispute about where the child should live, see *Leser* v. *Berridge*, 668 F.3d 1202, 1208 (10th Cir. 2011) (district court entered written order reflecting parents' "agreement the children would in fact return to the Czech Republic"), or the parent seeking relief under the Convention permanently

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[7] Courts regularly render judgments that face impediments to enforcement. For example, a court may award a monetary judgment in a civil or criminal case even if the defendant lacks the funds to pay the judgment. Such a "case is not mooted by the fact that" the defendant "lack[s] the means to satisfy [the] judgment." *MCI Telecomms. Corp.* v. *Credit Builders of Am., Inc.*, 2 F.3d 103, 104 (5th Cir.), cert. denied, 510 U.S. 978 (1993); see 13C Charles A. Wright et al., *Federal Practice and Procedure* § 3533.3, at 3 (3d ed. 2008). Similarly, a court may render a judgment against a defendant whose person or assets are outside the United States or who cannot be found; although there may be significant impediments to enforcement in such circumstances, those obstacles do not make the case moot. See, *e.g.*, *Fawcett*, 326 F.3d at 496 (citing cases).

moved to the country where the child and other parent live, see *Von Kennel Gaudin* v. *Remis*, 282 F.3d 1178, 1183 (9th Cir. 2002).

But those situations are all unlike this case, because in those instances, either there would be no adversity or the parties no longer would have rights under the Convention. Here, by contrast, the child has not reached age 16, there remains a live dispute between the parties about where the child should reside, and a federal appellate court's resolution of that dispute could have numerous consequences for the parties. Accordingly, the case is not moot under this Court's Article III jurisprudence.

C. The History And Purposes Of The Convention Support The Conclusion That An Appeal Of A Return Order Is Not Mooted By The Child's Return

1. The Convention's "central operating feature" is its "return remedy." *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1989 (2010). A court must issue a return order when a child has been wrongfully removed or retained in a contracting State in violation of a parent's or other person's custody rights and none of the defenses to return apply. See Convention Arts. 1, 4, 12-13. But the Convention does not expressly address what should happen when an initial judicial or administrative authority enters a return order and the losing party appeals it. Instead, the Convention generally leaves the procedures for adjudicating return petitions in the first instance or on appeal to be determined as a matter of domestic law. See *Explanatory Report* 426, para. 63, at 444.

One thing that is clear under the Convention, however, is that a child should be returned to her country of habitual residence promptly. The Convention's primary object is "to secure the prompt return of children wrongfully removed to or retained in any Contracting

State." Convention Art. 1(a). The Convention obligates States Parties to "use the most expeditious procedures available" to implement the Convention within their territories and provides that the judicial or administrative authorities in those States shall "act expeditiously in proceedings for the return of children." Arts. 2, 11. The Convention sets an aspirational goal of reaching a decision on a petition for return within six weeks of its filing. Art. 11. The Convention further provides that once an administrative or judicial authority in a contracting State has determined that a child has been wrongfully removed or retained and no exception applies, it "shall order the return of the child forthwith." Art. 12.

Accordingly, once a district court has entered a return order under the Convention, it will be appropriate in many cases for the court to permit return pending appeal. That course will often enable children to be returned to familiar surroundings and established social and family networks. See Convention Introductory decls.; 51 Fed. Reg. at 10,504. The Hague Convention is premised on the principle that a decision regarding return should be swiftly rendered to avoid the possibility that the child will become settled in a new environment and subsequently uprooted. The longer the child remains in a country that a court has decided is not the child's habitual residence, the more disruptive it will be for the child if she eventually returns to her habitual residence, and the more difficult it will be for the courts of that country to adjudicate custody. See *Friedrich* v. *Friedrich*, 78 F.3d 1060, 1063 n.1 (6th Cir. 1996); see also *Abbott*, 130 S. Ct. at 1996 (noting the "trauma" a child suffers when one parent "separate[s] [the child] from the second parent and the child's support system"). By providing a remedy of swift return, the Convention

helps to prevent abduction by removing an incentive a parent might have to "forum shop."

2. A rule that the return of a child in conformity with a return order moots an appeal of that order could have the unintended consequence of slowing cases down rather than speeding them up. If a case becomes moot when a child leaves the United States, then courts would be more likely to grant stays of return orders pending appeal. See, *e.g.*, *John Doe Agency* v. *John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers) (probability of mootness is a "compelling justification" for granting stay in Freedom of Information Act case). But "[s]taying the return of a child in an action under the Convention should hardly be a matter of course," because it would keep the child from what has been found to be her country of habitual residence and would benefit the parent who the district court found to have wrongfully removed or retained the child. *Friedrich*, 78 F.3d at 1063 n.1; see *Bekier*, 248 F.3d at 1055 (acknowledging that the court's mootness holding "to some degree conflicts with the purposes of the Convention: to prevent parents from fleeing jurisdictions to find a more favorable judicial forum and to return children to their habitual residence in a timely fashion").

Indeed, delay in implementation of a return order pending appeal could take an older child outside of the Convention's scope of coverage entirely. See Convention Art. 4; see also 51 Fed. Reg. at 10,504 ("Even if a child is under sixteen at the time * * * the Convention is invoked, the Convention ceases to apply when the child reaches sixteen."). Similarly, a holding that return of the child moots an appeal would give the parent found to have wrongfully removed or retained a child a strong incentive to seek further review even in a weak case in

order to increase the likelihood that the child would remain with that parent for the duration of the appeal.

Finally, a routine practice of imposing stays in Hague Convention cases would undermine efforts to obtain prompt return of children abducted from the United States. It is already difficult for U.S. courts to meet the Convention's aspirational time limits in providing an initial Hague Convention decision. If courts in the United States routinely issued stays barring return pending appeal, it would be difficult for the United States to encourage other countries to act promptly in adjudicating Hague Convention petitions, thereby stranding children abroad during lengthy appeal processes.

3. Under the court of appeals' decision, the alternative to requiring a child to remain in the United States to prevent mootness is to cut off the losing parent's appellate rights if the child is returned after the trial court's ruling and require the parties to start over in another country. No such result is required by the Convention or ICARA: "While it is true that the process for the adjudication of Hague Convention petitions should be as quick as possible, neither the Convention nor the U.S. implementing legislation restricts the appellate process." *Walsh* v. *Walsh*, 221 F.3d 204, 214 (1st Cir. 2000) (citation omitted), cert. denied, 531 U.S. 1159 (2001). Reading the Convention to extinguish a parent's right of appeal when the child departs the United States would be an unwarranted intrusion into this country's domestic law, contrary to the Convention's approach of generally leaving procedural issues to be decided by each State Party.

This Court likewise should not assume that Congress, in enacting ICARA, decided *sub silento* to limit appellate review of Hague Convention orders in this manner.

Federal law generally affords an aggrieved party an appeal as of right from a final district court decision. See 28 U.S.C. 1291; Fed. R. App. P. 3. If Congress had meant to curtail that right under the Convention by barring any appellate proceedings following return, it would have been expected to do so expressly. See *Greenlaw* v. *United States*, 554 U.S. 237, 250 (2008) (when Congress legislates against a backdrop of "solidly grounded rule[s] of appellate practice," the inference to be drawn from silence is that Congress intended for the new provision to "operate in harmony" with those rules); see also, *e.g.*, *Silva* v. *Di Vittorio*, 658 F.3d 1090, 1098 (9th Cir. 2011) (dismissal of a prisoner's case should not count as a "strike" for purposes of the Prison Litigation Reform Act's "three-strikes" rule until after the prisoner has waived or exhausted his opportunity to appeal). And in fact ICARA's legislative history suggests that Congress expected the losing parent would be able to appeal a return order. See H.R. Rep. No. 525, 100th Cong., 2d Sess. 12 (1988) (*House Report*) (stating that the "full faith and credit" provision of ICARA, 42 U.S.C. 11603(g) was "not intended to deny the possibility of appeal from a return order or a decision denying a return order").

Moreover, requiring a stay as a condition of appellate review would make it more difficult to achieve the "uniform international interpretation of the Convention" that Congress intended, 42 U.S.C. 11601(b)(3)(B), as it would terminate the full course of appellate proceedings except in cases in which stays had been obtained or where return was denied. See also *House Report* 10 (emphasizing "the need for uniformity in [the Convention's] interpretation in the United States"). In contrast, permitting appeals to go forward after a child has

been returned will secure both the prompt return of the child and the full appellate review necessary to promote national uniformity in interpretation of the Convention.[8]

4. We are aware of only one foreign court of last resort that has directly addressed the mootness issue. Its decision is consistent with the conclusion that this case is not moot.

In a 2002 decision, the Spanish Constitutional Court held that an appeal of a return order was not mooted by return of the child in accordance with the order. See S.T.C., May 20, 2002 (B.O.E., No. 120, p. 47) (Spain).[9] In that case, the mother and father of the child obtained a divorce in Poland, and the Polish court awarded custody to the father. Decision 3-4. The mother traveled to Spain with the child, and the father filed a Hague Convention petition in Spain to secure the child's return to Poland. *Id.* at 4. The Spanish trial court ordered the child returned to Poland, and the child was returned. *Id.* at 4-5. The mother filed an appeal, and the appellate

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[8] In its amicus brief filed at the Court's invitation in *Janakakis-Kostun* v. *Janakakis*, 531 U.S. 811 (2000) (No. 99-1496), the United States urged denial of a petition for certiorari concerning standards for establishing a certain Hague Convention defense. The brief suggested in passing that the case was a poor vehicle for further review because the child had been returned to Greece in compliance with the return order and "the case appears to be effectively moot." Br. at 19. The mootness question had not been addressed by the court of appeals, see *ibid.*, and the government's brief did not take a definitive position on that question. After full consideration of the continuing legal consequences of a return order and the ability of a reviewing court to provide relief, the United States has concluded that return of the child does not moot an appeal of a return order.

[9] The State Department's Office of Language Services has prepared a translation of this decision. With this brief, the United States is filing a request to lodge the translation. This brief cites to page numbers in the translation.

court held that the "appeal is moot" because "the child ha[s] been returned to her country of origin." *Id.* at 5; see *id.* at 19.

The question before the Spanish Constitutional Court was whether the intermediate appellate court violated the mother's right under the Spanish Constitution "to obtain a decision, based on law, on the merits of the claim asserted." Decision 10. The court held that the case was not moot and thus that the mother had been denied her constitutional right to effective judicial protection. *Id.* at 25-26. The court explained that, in enacting the domestic laws implementing the Convention, "[i]t was the intent of the Legislature" for an initial decision regarding return "to be subject to the right of review by the second-instance court." *Id.* at 23. The court observed that domestic law provided a particular timeframe for such an appeal, and it "indicate[d] that the consideration of the appeal shall not stay execution of the first-instance decision." *Ibid.* In the court's view, the "Spanish Legislature must have foreseen that one of the possible consequences" of its procedural rules would be "that at the time the appeal is decided * * *, the decision appealed may already have been executed," yet the legislature did not require the appellate court to "refrain * * * from issuing a ruling on the merits of the issue placed before it." *Ibid.*

The Spanish Constitutional Court further explained that, even though the child had been returned to Poland, "it was not meaningless for the Provincial Court to issue a determination on the issue of whether or not the appellant had illegally removed her daughter from Poland to Spain, especially since, throughout the proceeding, the mother had maintained that the father did not actually exercise custody rights to the child, who had always

been in the care and company of her maternal grandparents." Decision 25. The court observed that "[a] determination on this issue, regardless of its effectiveness in the Spanish proceeding once the child had been returned via execution of the decision under appeal, could still be relevant to the interests" of the mother because "a decision favorable to [her] could be invoked before the courts of Poland hearing the divorce proceeding between the parents in order to support or strengthen the mother's rights to obtain custody of the child." *Ibid.* The court therefore directed the appellate court to "decide the appeal as justice may require." *Id.* at 26.[10]

A 2006 survey of States Parties revealed that, although virtually all of the responding countries permitted appeal of a return order, a number of jurisdictions permitted immediate enforcement of the order, with the filing of an appeal sometimes, but not always, staying enforcement. See Hague Conference on Private Int'l Law, *Enforcement of Orders Made Under the 1980 Convention: A Comparative Legal Study, Prelim. Doc. No. 6 of Oct. 2006, for 5th Meeting of Special Comm'n to review the operation of the Hague Convention* 22-23, 31-33 & nn.95, 99. Although the surveyed States apparently did not specify whether enforcement of the order would

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[10] Petitioner also cites (Br. 50) a Portuguese decision. A congressional document reports that, in that case, the "judge decided to immediately return the child to Canada, with the respective judicial delivery of the child"; then "[o]n the appellate level, the Court of Appeals of Lisbon granted the right to appeal to the Portuguese parent." Directorate of Legal Research, The Law Library of Congress, *Report for Congress: Hague Convention on International Child Abduction* 291 & n.28 (June 2004) (citing Ac. Rel. Lisboa of May 2, 1989, No. 0002087, Rel. Herlander Martins (Port.)). We have been unable to obtain a legible copy of that decision and therefore cannot discern whether the court explicitly addressed mootness.

moot an appeal, there is no indication that return typically would be a barrier to an appeal if no stay was granted. See also Hague Conference on Private Int'l Law, *Guide to Good Practice Under the Hague Convention of 25 Oct. 1980 on the Civil Aspects of International Child Abduction* 19-20 (2003) (making recommendations for expediting proceedings, apparently based on the premise that an appeal could go forward if a child is returned). Accordingly, there is no indication that the practice of the States Parties is inconsistent with the conclusion that this case is not moot under Article III.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for a decision on the merits of the appeal.

Respectfully submitted.

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OCTOBER 2012

AMICUS CURIAE BRIEF

No. 11-1347

In the Supreme Court of the United States

JEFFREY LEE CHAFIN, *Petitioner*,

v.

LYNNE HALES CHAFIN, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE CENTRE FOR FAMILY LAW AND POLICY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Centre for Family Law and Practice (hereafter "CFLP") was established in January 2009 at London Metropolitan University, London, England to address the interface between the academy and practice in family law. CFLP is concerned with the academic and practical aspects of Family Law and, in particular, international Family Law, and specifically international child abduction. CFLP works closely with both legal and non-legal specialist practitioners, members of the judiciary, and academics, to address areas of common concern relating to the international movement of children, and international family mobility in general.

CFLP's interest in the instant case relates to concerns about (i) the effect of continuing litigation on children following return to the state of habitual residence in accordance with the provisions of the 1980 Hague Convention on the Civil Aspects of International Child Abduction (hereafter "Hague Convention"), and (ii) the effect on children following return to the state of habitual residence in accordance with the Hague Convention of a possible re-return to the requested state as a result of continuing litigation subsequent to the initial return order. CFLP remains concerned about the effect on children of being involved in protracted litigation

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[1] Pursuant to Sup. Ct. R. 37.6, *Amicus Curiae* certifies that no counsel for a party to this action authored any part of this Brief, nor did any person or entity, other than *Amicus*, its members, or its counsel make a monetary contribution to fund the preparation or submission of this Brief. Counsel of record for the parties to this action have consented to the filing of this Brief.

after believing it to have ended, and of being vulnerable to further major upheaval in their lives, having believed themselves to be settled in a particular environment at the conclusion of legal proceedings. For some children the return following an abduction can be as upsetting as the original abduction. A subsequent re-return may make matters even worse for a child who is already profoundly distressed.

CFLP intervened in the first family case to reach the Supreme Court of England and Wales – *Re I (A Child)(Contact Application: Jurisdiction)*, [2009] UKSC 10, [2010], 1 A.C. 319 (Eng. & Wales). Jacqueline Renton and CFLP Co-Director Marilyn Freeman were also part of the team that submitted a brief *amicus curiae* brief in this Court in the case of *Abbott v. Abbott*, 130 S. Ct. 1983 (2010). Baroness Hale of Richmond, a Justice of the Supreme Court of England and Wales, is CFLP's Patron. CFLP's counsel Timothy Scott QC, David Williams and Jacqueline Renton are members of the English Bar.[2]

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[2] Mr. Scott QC, Mr. Williams and Ms. Renton are Barristers practicing in London and are all specialists in the field of international family law. Mr. Scott QC is a Barrister at 29 Bedford Row. Mr. Williams and Ms. Renton are Barristers at 4 Paper Buildings. Mr. Scott QC, Mr. Williams and Ms. Renton have acted as Lead and Junior Counsel respectively in numerous cases concerning the Hague Convention, international child law and international family law at first instance and in the appellate courts including the House of Lords and (now) the U.K. Supreme Court. Ms. Renton also worked at the International Child Abduction and Contact Unit, the Central Authority for England and Wales, before entering private practice.

CFLP recognizes that the central issue in this appeal is whether the return of the child E.C. to Scotland moots the appeal from the District Court to the Court of Appeals. As this appeal raises issues implicating the manner in which child abduction cases are addressed in the United Kingdom, CFLP hopes to assist the Court through the presentation of information regarding the law and procedure pertaining to the management of such cases in the United Kingdom.

Scotland is a constituent part of the United Kingdom. The U.K. comprises three jurisdictions: England and Wales (a single jurisdiction), Scotland, and Northern Ireland. Each jurisdiction has a separate court system, but all three share an ultimate appellate court which until 2009 was the House of Lords and since 2009 has been the U.K. Supreme Court. In certain respects each of the three U.K. jurisdictions has a separate system of law. However, in all respects which affect the U.K. as a whole the three court systems administer the same law. The Hague Convention is an international instrument to which the U.K. acceded as a single sovereign nation. Scottish courts therefore deal with Hague Convention cases on exactly the same basis as English and Welsh (and Northern Irish) courts, subject to minor differences of procedure and terminology. Authorities from England and Wales can be and are cited in Scottish Hague Convention cases (and vice versa).[3]

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[3] In this connection it should be noted that the references at p.3 of the Petition to the mother as "a Scottish national" and at p.5 of the Petition to the mother having a "Scottish passport" are incorrect. The mother is a U.K. national and has a U.K. passport.

SUMMARY OF THE ARGUMENT

1. A reversal of the District Court's order would not give rise to any order capable of impacting court proceedings in Scotland in a meaningful way. Were the Appellate Court to consider Petitioner's appeal on its merits and conclude that the District Court erred in finding that E.C. was habitually resident in Scotland in May 2011, when the mother filed her petition seeking return of her child to Scotland, this conclusion would be irrelevant to any current or future proceedings in Scotland. Whatever the parties' position was in May 2011, the Scottish court's exercise of jurisdiction to consider custody must now turn on the child's *current* habitual residence, rather than her habitual residence more than 18 months ago. The issues that would be presented by the Petitioner in the Court of Appeals in seeking reversal of the District Court's decision are thus no longer live issues between the parties, and no effectual relief could be granted to the Petitioner upon reversal of the District Court's return order. Consequently, neither the U.K. doctrines of *res judicata* and issue estoppel (equivalent to preclusion), nor principles of comity, would be of any assistance to the father, as there is no material fact or relevant issue which the mother would be precluded from challenging. Nor would reversal assist the father in surmounting any of the obstacles he now faces should he seek to compel E.C.'s return to the United States through a new action under the Hague Convention.

2. Children are best served by swift and conclusive decisions about their future in the courts of the country in which they are habitually resident. Avoidance of delay is central to this policy, and delay in legal proceedings of any kind is inherently damaging to the welfare of a child. Finding that a child's return home does not moot a respondent's appeal would encourage exactly the kind of competing court proceedings that the Hague Convention was aimed at preventing. The underlying purposes of the Hague Convention thus support the Eleventh Circuit's conclusion that a child's return to a requesting state moots a respondent's appeal.

3. The combination of an expedited appeals process and a respondent's ability to seek a stay of enforcement strikes an appropriate balance between the rights of a parent who seeks return of an abducted child, and the authority of reviewing courts to consider meritorious appeals. As measured against the fundamental purposes of the Hague Convention, the failure of an abducting parent to take full advantage of the right to seek a stay (as was the case in the instant matter) is a sufficient basis for concluding that an appeal is moot when a child has returned to her habitual residence.

ARGUMENT

I. A DETERMINATION UPON REVERSAL THAT E.C. WAS HABITUALLY RESIDENT IN ALABAMA AT THE TIME OF HER ALLEGED WRONGFUL REMOVAL WOULD HAVE NO RELEVANCE TO ANY LIVE ISSUE IN THE SCOTTISH COURT NOW ADDRESSING ISSUES RELATING TO THE MINOR'S CUSTODY.

A. The Minor's Habitual Residence as of May 2011 Is Not Determinative of Her Current Habitual Residence.

A key factor in the arguments of the father (and of the *amici* who support his position) is the alleged benefit to the father (both in the United States and in Scotland) that would follow from a decision by the Court of Appeals reversing the District Court. Petitioner's central contention is that if the Court of Appeals were to consider the appeal on its merits and reverse the District Court, this would operate as a finding that E.C. continues to be habitually resident in the U.S. now. However, based on its familiarity with family courts in the United Kingdom, CFLP urges this Court to recognize that such a reversal would not and could not meaningfully impact any proceedings in Scotland relating to E.C., insofar as her habitual residence in May 2011 would not be determinative of her current habitual residence.

Habitual residence is not defined in the Hague Convention or in any other international instrument. In U.K. cases where the other country involved in the litigation is not a signatory to Council Regulation No.

2201/2003 (EC) (hereafter "Brussels II Revised Regulation 2003"), the authorities [4] show that habitual residence means voluntary presence in a country with a settled intention for an appreciable period of time (*Nessa v. Chief Adjudication Officer*, [1999] 2 F.L.R. 1116), and that habitual residence is a question of fact to be decided on all the circumstances of the case (*Re J (A Minor) (Abduction: Custody Rights)*, [1990] 2 A.C. 562 (H.L.). Lord Brandon in *Nessa v. Chief Adjudication Officer* stressed that habitual residence is not an artificial legal construct. In *Re S (A Minor) (Custody: Habitual Residence)*, [1998] A.C. 750 Lord Slynn said (at 762) that if a mother of a young child who has parental rights leaves one country to go to another with the established intention of settling there permanently, her habitual residence and that of the child may change very quickly. A unilateral removal of a child by one parent without the permission of the other parent or a competent court will not bring about a change of that child's habitual residence. *Re P (GE) (An Infant)*, [1965] Ch. 586; *Re A (Wardship: Jurisdiction)*, [1995] 1 F.L.R. 767. However, that is an exception to the general principle that habitual residence is purely a question of fact. In *Re P-J (Abduction: Habitual Residence: Consent)*, [2009] EWCA (Civ) 588, [26], the Court of Appeal stated that 'habitual residence' was to be understood according to its ordinary and natural meaning; that habitual residence can be lost but not gained in one

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[4] The leading case on the interpretation of 'habitual residence' in cases where both states are signatories to Brussels II Revised Regulation 2003 is the European Court of Justice Case C-497/10 PPU, *Mercredi v. Chaffe* (2010).

day; and that the requisite period of time is not a fixed period but is assessed taking into account all the circumstances of the case.

When considering E.C.'s current habitual residence the Scottish court would look at the present factual matrix. The mother and E.C. moved from Alabama to Scotland in October 2011 with the express permission of the District Court and with a settled intention to live there. That was a lawful move. For a period well in excess of one year they have been living in Scotland; that period will have been extended by the time any proceedings conclude before a Scottish court. They now have a settled home. E.C. is attending school. She is habitually resident in Scotland, following a lawful move and the establishment of residence there with a settled intention for an appreciable period of time.

E.C.'s current habitual residence would not be affected if the Court of Appeals were to reverse the District Court's decision on this issue. The District Court's decision related to E.C.'s habitual residence in May 2011. A reversal would not operate retrospectively so as to make the move in October 2011 a wrongful removal. Indeed, E.C.'s place of habitual residence at an earlier time in her life would be at best only tangentially relevant to the determination of her present habitual residence.

In short, from a U.K. perspective, a judgment upon reversal that the child was habitually resident in the United States as of May 2011 would not retrospectively make the mother's removal of E.C. to Scotland in October 2011 wrongful when she had the express permission of the competent U.S. court at the material time. Similarly, such a judgment would not mean that the mother's retention of E.C. in

Scotland after the October 2011 was wrongful; would not affect the rights, duties or obligations of either parent; would not confer any enforceable rights on the father against the mother; and would not reflect adversely on the mother in any way. Accordingly, the issue of habitual residence which was determined by the District Court in October 2011 is simply not a live issue between the parties.[5]

B. Because the Only Factual Judgment that Might Follow from Reversal Has No Current Relevance to Proceedings Before the Scottish Court, Neither The Doctrine of *Res Judicata* nor Principles of Comity Has Any Application to the Parties' Ongoing Dispute Over Custody.

The U.K. doctrines of *res judicata* and issue estoppel (which overlap) are akin to the US doctrine of preclusion. The Scottish authorities cited by the Petitioner show that the ambit of the doctrine of *res judicata* in Scotland is well defined and narrow. A party is only precluded from arguing a point if that precise point has been decided in the other jurisdiction.

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[5] Further, it seems unlikely that the Court of Appeals would be willing to consider the appeal against the decision under Article 13(b) which is surely moot. Any question of whether the return to Scotland of E.C. in October 2011 might have been a risk to E.C.'s welfare, or place E.C in an intolerable situation, has been overtaken by events so as to be completely hypothetical. The issue of grave risk or intolerability under article 13(b) is not a live issue between the parties.

A reversal of the District Court by the Court of Appeals would establish at most that E.C. had been habitually resident in the U.S. in May 2011. However, in any future proceedings in Scotland (whether under the Hague Convention or otherwise) the Scottish court would not be concerned with E.C.'s habitual residence in May 2011, but rather with her habitual residence either at the date of an alleged abduction (for Hague Convention proceedings) or at the date when proceedings were started (for any other kind of proceedings). A reversal of the District Court by the Court of Appeals would not amount to a decision about E.C.'s habitual residence at any date which was material to the issues before the Scottish court. Should the Court of Appeals reverse on the merits and present the Father with opportunity to argue *res judicata*, the conclusions of fact or law that would be the subjects of such an argument would simply not be relevant to any issue germane to proceedings in the Scottish court. The only fact which the mother would be precluded from re-arguing (habitual residence in May 2011) would be beside the point.

The doctrine of comity is also highly developed in U.K. law. A judgment given by a competent foreign court which is final and conclusive on the merits will generally be entitled to recognition and can be relied on in proceedings in a U.K. court. Dicey, Morris & Collins, *The Conflict of Laws* (14th Ed. 2006). The very limited effect of a successful appeal by the father has been analyzed above. If the Court of Appeals were to reverse the District Court, the only effect would be a finding that E.C. had been habitually resident in the US in May 2011; and that the mother's application for a return order should

therefore have been dismissed. The parental rights of the parents would not be impacted and no adverse findings could be made against the mother. The doctrine of comity would therefore have no practical application. While Scottish courts frequently defer to foreign judgments, in this case there would be nothing relevant or material to which a Scottish court would or could defer. The issues which would be before the Scottish court would not have been litigated in the U.S.

Further, it is not right to assume (as the Petitioner does) that the Scottish court when determining a Hague Convention application will always return a child to the U.S. where proceedings are already pending in deference to the U.S. court's rulings. The Petitioner wrongly cites the Scottish case of *TLMP v. AWP*, [2012] CSOH 121 in support of this assumption. In that case the father alleged that the mother had wrongfully retained the child in Scotland. The Court of Session ordered the return of child to the USA as the mother's defenses were not established. The child was not returned out of deference by the Scottish court to the U.S. proceedings that had been commenced by the father subsequent to the abduction of the child.

Section 26 Family Law Act 1986 provides that an order relating to parental responsibilities or parental rights in relation to a child which is made outside the United Kingdom shall be recognised in Scotland if the order was made in the country where the child was habitually resident. However, an order made in Hague Convention a proceeding is not "an order relating to parental responsibilities or parental rights." It is an order which determines where parental rights and responsibilities shall be decided.

It goes only to the venue and not to the substance. It is not a custody order. Such an order would not fall within Section 26 Family Law Act.

In sum, a reversal by the Court of Appeals of the order of the District Court would not in any event give rise to any order which was *capable* of recognition (let alone enforcement) except in relation to E.C.'s habitual residence as of May 2011. There would be nothing else a Scottish court could be asked to recognise.

C. A Reversal on the Merits Would Have No Relevance to a New Application from the Father under the Hague Convention for the Return of E.C. to the United States.

If the father were to make an application in Scotland under the Hague Convention for the return of E.C. to the U.S., he would have to establish that she had been wrongfully removed to or retained in Scotland at a time when she was habitually resident in the United States. Convention, Articles 3 and 4. The mother's removal of E.C. to Scotland in October 2011 cannot have been wrongful since she had the express permission of the District Court. A subsequent finding by the Court of Appeals that the District Court had been wrong on the issue of habitual residence would not affect this. A lawful removal cannot retrospectively be rendered a wrongful one; rights have been acquired and decisions taken on the basis of a court judgment, including by third parties such as government agencies. The mother cannot now be faulted for acting on a lawful decision of the District Court.

For the reasons given above a reversal by the Court of Appeals of the decision of the District Court would *not* have retrospective effect so as to the make the removal of E.C. to Scotland in October 2011 (or the subsequent retention) wrongful. Even with a reversal, the father would be unable to prove a wrongful removal or retention. In addition he would be unable to show that E.C. was habitually resident in the U.S. at any material time. E.C. has been resident in Scotland since October 2011 and habitually resident in Scotland since some date quite soon after that. The father would therefore fail under Article 4 as well.

If he could somehow overcome the hurdles he faces in satisfying the requirements of Articles 3 and 4 the father would still face a further hurdle in Article 12. A period of over one year has now passed since E.C. arrived in Scotland. If (as seems very likely) the mother was able to show that E.C. is now settled in her new environment, there would be no obligation on the Scottish court to order a return to the U.S.

One of the main objectives of the Hague Convention – the restoration of the *status quo ante* by means of the prompt return of the child who has been wrongfully removed / retained – could not be fulfilled by virtue of the father issuing Hague Convention proceedings subsequent to a reversal by the Court of Appeals. *See* Elisa Perez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* ¶ 16. The 'return remedy' could not be utilized.[6]

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[6] The Brief *amicus curiae* of the National Center for Missing and Exploited Children also overstates the powers afforded to Central Authorities who are asked to help secure the return of a

When the mother started custody proceedings in Scotland she pleaded and relied on the decision of the District Court in her favour. At that time it was necessary for her to show that she had brought E.C. to Scotland lawfully and that she was not an abductor. However, it does not follow that an appellate reversal in the U.S. would also reverse the position in Scotland. The situation now is that E.C. has become habitually resident in Scotland. That is what would concern the Scottish court, not a decision by a U.S. court about where she had been habitually resident at an earlier date.

It is therefore wrong to say that an appellate reversal of the District Court would amount to a 'red light' to the Scottish proceedings. The Scottish preference for preserving the *status quo ante* would now operate in the mother's favor. A new *status quo ante* has developed since October 2011 in which E.C. and the mother have a settled way of life in Scotland. Those are the facts on the ground which would not be changed by an appellate reversal in the U.S.

There is no basis for the suggestion that an appellate reversal of the District Court would lead the Scottish court to stay ('sist' in Scottish terminology) its custody proceedings. The Scottish proceedings were validly seised by the mother following the lawful move of E.C. to Scotland. The

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child. Co-operation between states via their respective Central Authorities would not circumvent the need for the father to issue a Hague Convention application in the requesting state (Scotland). The duties of a Central Authority only extend to facilitating and promoting co-operation with other Central Authorities. *See* Hague Convention, Art. 7. A Central Authority cannot help return a child without a parent going through the appropriate litigation channels.

Scottish court would be considering the welfare of a child who is not merely habitually resident in Scotland in a technical sense, but well settled in Scotland and becoming more settled with every month which passes. When E.C. arrived in Scotland in October 2011 she was 4 years and 9 months old. A year is a long time in the life of a child of that age.

The principle which underlies not only the Hague Convention but private international law generally is that disputes about the welfare of children should be decided in the courts of the country where they are habitually resident. E.C. lives and goes to school in Scotland. She is a U.K. (as well as a U.S.) citizen. She has a Scottish mother. It is unrealistic to suggest that a Scottish court would decline to adjudicate on custody or other welfare issues, on the basis of the doctrine of *forum conveniens*, simply because of a decision by a U.S. court about where E.C. was habitually resident at a date which is now 18 months distant.[7]

Finally, with regard to the only issue of real consequence between the parties (*i.e*, custody of E.C.) the mother would no more benefit from an appellate

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[7] Appellate reversal of the finding that the father wrongfully retained E.C. in the U.S. in May 2011 might assist his cause insofar as it would remove his stigmatization as an abductor. However, this limited and tangential consequence of reversal hardly seems like the kind of consequence sufficient to warrant application of an exception to the doctrine of mootness. Even with this stigmatization left intact, the father is not precluded from arguing the merits of his conduct in the Scottish court as they pertain to any dispute over custody simply because he has been labeled an abductor, nor is the Scottish Court precluded from reaching its own conclusion as to the father's conduct and its impact on the merits of his position as to custody of the Minor.

dismissal than the father would benefit from a successful appeal. All that the mother needed to show to the Scottish court was that she had brought E.C. to Scotland lawfully. That position would not be affected by the outcome of the appeal. The mother would gain nothing of consequence in proceedings in Scotland if the father's appeal was dismissed.

II. THE UNDERLYING PURPOSES OF THE HAGUE CONVENTION SUPPORT THE CONCLUSION THAT AN APPEAL IS MOOT ONCE THE CHILD HAS RETURNED TO THE REQUESTING JURISDICTION.

Article 12 of the Hague Convention provides that judicial authorities may stay or dismiss proceedings when a child is no longer located in the jurisdiction. As an international agreement concluded between States in written form, the Hague Convention should be interpreted purposively. *See* Vienna Convention on the Law of Treaties, art. 2(1)(a) and 31, May 23, 1969. The determination of the issue of mootness should thus be influenced by the nature and purpose of the international instrument out of which this appeal arises, the Hague Convention. The *Explanatory Report on the 1980 Hague Child Abduction Convention* by Elisa Perez-Vera, paragraph 11 explains that Article 12 has been "inspired by considerations of procedural economy." While the text of the Hague Convention does not explicitly state whether a child's continuing presence is a necessary pre-requisite to jurisdiction, it must be understood that a primary purpose of the Convention is to achieve the swift return of abducted children to their country of habitual residence to

enable the courts of that country to make a full welfare based decision. This Court should be particularly cautious about rendering a decision that would lead to effects running counter to the very purpose for which the Convention was implemented. As Baroness Hale of Richmond put it in *Re D (Abduction: Rights of Custody)*, [2007] 1 F.L.R. 961, [52], "No one intended that an instrument designed to secure the protection of children from the harmful effects of international child abduction should be itself turned into an instrument of harm."

It is in the child's interests to mitigate (so far as possible) the harm caused by litigation by reaching a speedy and definitive decision. That interest is self-evidently undermined by delay in reaching a decision about the future of a child or by an outcome that fosters uncertainty about where any such decision should be made. Litigation about a child is at best a necessary evil. This is at least in part the rationale behind the choice of venue rule which is at the heart of the Hague Convention. The automatic choice of the courts of the country in which the child was habitually resident is driven not only by the consideration that those courts are likely to be best placed to make such decisions; but also in order to avoid delay and uncertainty while a satellite decision is reached about which court should make the substantive decision.

It is notable that in the Brief of Petitioner much is said about the supposed litigation advantages to the father if he prevails on the appeal (which are disputed): but little or nothing about the welfare of E.C. Professor Marilyn Freeman (CFLP's co-Director) conducted research into the effects of international child abduction on behalf of **reunite**, a

Child Abduction Centre funded by the U.K. Government. Marilyn Freeman, *International Parental Child Abduction: The Effects*, THE REUNITE RESEARCH UNIT (U.K.), May 2006, *available at http://www.reunite.org/pages/effects_research.asp* (hereafter "Effects"). Her research involved 30 adult interviews relating to 22 separate cases, as well as 10 child interviews from 7 of the participating families. The child interview component is extremely unusual and provides important insights into the abduction process from the child's perspective. The Effects research report details how the children felt angry and confused by the court battle and the insecurity of their living arrangements. Their trust in one of their parents, and sometimes both, was compromised. The children "yearned for an end to the ongoing proceedings" and resented being caught up in the adult conflict. They did not want to hear negative things about either parent or to feel that they had to defend the other parent. Effects, p. 60. Some children had said that the return can be as upsetting and stressful as the original abduction (*id.* at 61) and that it was the uncertainty, insecurity and conflict between their parents that caused the most distress (*id.* at 62). All the children were uncomfortable with the insecurity of their practical living arrangements and the upheaval of frequent moves. *Id.*

This research reflects the importance of procedures that safeguard the ability of a court to reach decisive and definitive conclusions in litigation over children. This is an important policy reason why an appeal should be moot in the circumstances of this case. If a child returns to another jurisdiction pursuant to a U.S. court order (as happened in this case) she is likely to be deemed to be habitually

resident in that jurisdiction upon return, notwithstanding any continuing litigation in the requested state in the child's absence. Courts of the jurisdiction to which the child has returned will become the courts in which issues concerning her custody and welfare should be decided. If the U.S. courts continue to make orders concerning the child once the home jurisdiction (here, Scotland) is fully vested with jurisdiction to address custody, there is a risk of competing and inconsistent orders that are inherently damaging to children and disserve their interests.

The position of the Petitioner envisages an unhappy and future for E.C. in which there is likely to be continuing litigation in both Scotland and Alabama. Should the father prevail in his effort to secure a reversal of the District Court decision on its merits, he would then seek to reopen court proceedings in the Alabama family court and obtain an order of custody from that court. He would presumably also apply to sist (*i.e.* stay) the Scottish custody proceedings, or to transfer jurisdiction to the U.S court on the application of the doctrine of *forum conveniens*. In the most likely event that the Scottish court should decline to cede jurisdiction, E.C. would then be subject to competing court orders – exactly the result that the Hague Convention seeks to avoid. Even should the father succeed in persuading the Scottish Court to relinquish jurisdiction, the custody of E.C. will then be litigated in the courts of a jurisdiction where she will not have set foot for at least two years. The Alabama courts would have no practical means of assessing her welfare. Meanwhile E.C. will have been the subject of litigation for some three years, over half her life.

Either way it is hard to imagine a scenario which would be more damaging to her future welfare.

In a case where a child is returned to the Requesting State and with the passage of time settles and acquires habitual residence there, that child should not be subjected to a summary process to return her to the Requested State where an appeal against the original return order succeeds. Such a result would contravene one of the essential purposes of the Hague Convention, which is to vest a single court with clear jurisdiction to resolve custody disputes, as expeditiously as possible

III. An Appeals Process Allowing for Both Applications for a Stay and Expedited Review Of Cases Where the Child Remains in the Jurisdiction Strikes An Appropriate Balance Between the Rights of Litigants and the Parties' Interests in Prompt Resolution of Petitions for Return.

The Hague Convention does not put into place a scheme of enforcement or appeals, but specifies that proceedings should be completed within six weeks. *See* Convention, Article 11. There is debate within the international community as to whether or not the six-week period should include an appellate process. In England and Wales an effort is made to ensure that the six-week period includes the appellate process. Hague Convention appeals are invariably expedited. The six-week rule is an important feature of the Hague landscape. Hague proceedings are meant to be of a summary nature (evidentially and procedurally) so as to ensure

compliance with the policy of the Hague Convention, namely to protect children from the harmful effects of child abduction and promptly return them to their state of habitual residence.

The need for guidance on 'best practice' was recognized at the First International Forum hosted by NCMEC in Washington DC, in 1998. At the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (22–28 March 2001), the Special Commission concluded that the Convention requirement of an expeditious process applied equally to the appeal process. [8] The primary motivation for this conclusion appears to be that an extended appeal process could be misused by abductors to delay returns. However, it is suggested that from the child's perspective the need for a swift appeal derives from the benefit to the child of achieving certainty of outcome and thus security in the child's life.

The Hague Conference on Private International Law subsequently produced 2 important documents addressing the issue of enforcement. The first analyses the different approaches to enforcement in states that are signatories to the Hague Convention. *Enforcement of Orders Made Under the 1980 Convention: A Comparative Legal Study, Prelim. Doc. No. 6 of Oct. 2006, for 5th Meeting of Special Comm'n to review the*

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[8] Paragraph 3.3 of the Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (March 22–28, 2001).

operation of the Hague Convention. The Brief *amicus curiae* of the United States argues that there is no indication in this document that return would typically be a barrier to an appeal if no stay was granted. However, conversely, there is no indication in this document that return would typically *not* be a barrier to an appeal if no stay was granted.

The second discusses the possibility of provisional enforcement of a return order which is not yet final. *Guide to Good Practice Under the Hague Convention of 25 Oct. 1980 on the Civil Aspects of Child Abduction, Part IV – Enforcement* (hereafter, "Guide") (2010). However, contrary to the assertion of The United States in its Brief *amicus curiae*, the Guide does not presume that an appeal would not be moot once a child has left the jurisdiction dealing with the appellate litigation in the Hague Convention proceedings. Section 3 does though importantly make clear (amongst other things) the need for an expeditious resolution of the proceedings and suggests a number of provisions designed to assist in the swift determination of appeals, including limiting the time for appeal, requiring permission to appeal and limiting the number of courts to which an appeal could be made.

CFLP believes that consideration of the management of Hague hearings and appeals in England and Wales, as jurisdictions with shared legal roots, might be instructive for this Court. The English process is based on a system of discretionary stays and expedited appeals. There is no automatic stay procedure. An automatic stay procedure is not necessary if coupled with an expedited appellate structure. Further, an expedited appellate structure means that a child does not need to be returned

pending the conclusion of any appellate litigation that is allowed by a court.

In England and Wales, all Hague Convention 1980 proceedings are initially heard in the Family Division of the High Court as the court of first instance. A parent (or child, if that child is separately represented) has two possible chances of appeal from the first instance court: the Court of Appeal and then the Supreme Court.

If a parent wishes to appeal a decision at first instance (a decision of the High Court of England and Wales) to the Court of Appeal (the first tier appellate court) he or she needs to obtain leave from the first instance judge or from the Court of Appeal. *See* Family Procedure Rules 2010, Rule 30.3. If a parent wishes to appeal from the Court of Appeal to the Supreme Court, the parent must first apply for leave to appeal from the Court of Appeal, and if that is refused can then apply for leave from the Supreme Court. That court will only grant leave if the court: (a) considers that the appeal would have a real prospect of success, or (b) has some other compelling reason why the appeal should be heard. *Id.*

Unless the lower court or appeal courts order otherwise, an appeal does not operate as a stay of any order or decision of the lower court. *Id.*, Rule 30.8. However, if leave is granted by either the first instance judge or Court of Appeal, then a stay is almost always put in place by the court that granted leave. Without a stay in place, there is nothing to stop a parent from enforcing the return order of the first instance court. A return order without a stay is in practice a final order.

A parent has 21 days to lodge an appeal application with the Court of Appeal (unless a

different timeframe is imposed by the first instance court). *Id.*, Rule 30.4. There is a 'fast track' procedure for hearing appeals in the Court of Appeal and Supreme Court. The appellate courts have recognized the need for a swift determination of appeals in order to implement the need for prompt returns, with a target of 6 weeks to dispose of an appeal. *Re HB (Children's Objections)*, [1998] 1 F.L.R. 422.

In 2007 the Standing Orders of the House of Lords were amended to introduce an expedited appeal procedure for appeals from the Court of Appeal to the House of Lords. When the U.K. Supreme Court was created in 2009 a similar six-week expedited appeal procedure was implemented by The Supreme Court of the United Kingdom: Practice Direction 3, paragraph 3.4.4.

It is crucial that a child who has already been subjected to at least one international move is not moved from pillar to post as a consequence of the litigation itself. The English appellate structure provides one route to try to avoid this problem. It ensures that decisions about a child's future are determined expeditiously and at the same time protects a parent's / child's right to an appeal. By granting a stay only in cases where an appeal has a chance of success there is minimal disruption to the child's life. At the most, there is only one further international move of the child as a consequence of this structure.

It is respectfully suggested that the problem of mootness in Hague Convention appeals, which is highlighted by the arguments advanced on both sides in this appeal, is avoided by the application of expedited appellate procedures for which the English

route provides one possible model. Such procedures adequately safeguard both the rights of a parent who seeks return of an abducted child, and the authority of reviewing courts to consider meritorious appeals. As measured against the fundamental purposes of the Hague Convention, the failure of an abducting parent to take full advantage of the right to seek a stay (as was the case in the instant matter) is a sufficient basis for concluding that an appeal is moot when a child has returned to her habitual residence.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* the Centre for Law and Family Practice respectfully requests that this Court affirm the opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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JEFFREY LEE CHAFIN, PETITIONER,

v.

LYNN HALES CHAFIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN AS AMICUS CURIAE IN SUPPORT OF REVERSAL

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INTEREST OF AMICUS[1]

The National Center for Missing and Exploited Children ("NCMEC") was established in 1984 as a private, non-profit organization to assist families and law enforcement in the prevention of child abductions, the recovery of missing children, and the reduction of child victimization. NCMEC has been designated by Congress as "the official national resource center and information clearinghouse for missing and exploited children," and it receives a federal grant to perform nineteen statutorily-authorized functions benefiting missing or exploited children and their families. 42 U.S.C. 5773(b)(1). NCMEC works in cooperation with federal, state, local, and international law enforcement agencies on cases of international child abduction. 42 U.S.C. 5771(9)(C).

For many years, NCMEC fulfilled the functions of the United States Central Authority under the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention" or "Convention"), Oct. 24, 1980, T. I. A. S. No. 11670, S. Treaty Doc. No. 99–11, for "incoming cases," in which a parent abducts a child into the United States from a Contracting State. Beginning in 1995, the United States Department of State designated NCMEC, pursuant to a Cooperative Agreement, to perform the functions of the United

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[1] The parties have consented to the filing of this amicus curiae brief in support of reversal in letters on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than NCMEC and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

States Central Authority for incoming cases. Between 1995 and April 2008 (when the State Department assumed primary responsibility over incoming Convention abduction cases), NCMEC handled approximately 5,600 incoming Convention cases. NCMEC assisted left-behind parents with assembling applications for relief under the Convention, securing legal counsel, obtaining law enforcement and social services, and obtaining clarification of foreign custody laws from foreign authorities. NCMEC continues to provide technical assistance and resources to parents, attorneys, judges, and law enforcement officials involved in incoming cases. NCMEC also continues to maintain the International Child Abduction Attorney Network, a network of attorneys providing pro bono representation in abduction matters of all kinds, including Convention and non-Convention matters.

During its long involvement with Convention cases, NCMEC has established relationships with Central Authorities, legal representatives, and other agencies in many Convention Contracting States. These relationships provide NCMEC insight into the operation of the Convention in other Contracting States.

NCMEC participates as an amicus before this Court in cases that will have a significant effect on the Convention's efficient operation. NCMEC's overriding concern in all cases is that the Convention should operate in the best interests of children. The question presented implicates competing practical goals: to deter would-be abductors from crossing international borders in search of sympathetic courts, to facilitate the expeditious and accurate use of the return remedy, and to implement the Convention in a fashion which does not it-

self cause further instability and potential trauma in the lives of abducted children.

NCMEC believes that the court of appeals' holding—that the departure of a child pursuant to a return order moots an appeal from that order—is an incorrect interpretation of the Convention and should be reversed. NCMEC recognizes, however, that prolonged appeals, during which a child's status remains undetermined, undermines the goals of the Convention, and children's lives can be disrupted when they are uprooted numerous times. Thus, NCMEC urges the courts to adopt policies and procedures designed to ensure a temporary stay of return orders and expedited appellate review.

SUMMARY OF THE ARGUMENT

A child's departure from the United States pursuant to a duly issued return order does not moot an appeal from that order. Under established principles, an appeal is not moot unless there is no possibility of effectual relief for the losing party. That is not the case with an appeal from a district court's Convention return order, even if the prevailing party has already departed the country with the child. Even with the child gone, the appellant maintains a concrete interest in the outcome of the appeal. A successful appellant could, among other things, use the new judgment to support an affirmative custody action under the Uniform Child Custody Jurisdiction and Enforcement Act, seek voluntary or involuntary return of the child to the United States, and, in many cases, overturn any fee award made by the district court.

There are no special circumstances warranting departure from ordinary principles of justiciability in this case. The exercise of post-return jurisdiction is authorized by Article 12 of the Convention and has been repeatedly recognized as proper by Convention observers. The court of appeals' rule against exercise of post-return jurisdiction is contrary to the Convention and inconsistent with the majority of courts to have passed on the issue. Moreover, a categorical rule that the child's departure moots an appeal could easily lead courts to enter stays pending appeal as a matter of course in order to preserve the opportunity for full appellate review, even when a lengthy stay would be contrary to the purposes of the Convention.

NCMEC recognizes that lengthy appeals in Convention cases, and especially lengthy post-return appeals, may undermine the Convention's goals and cause further harm to children. The Convention is carefully structured to promote a balance between stability and speed in achieving the overall ideal that children should be returned to their habitual residences as quickly as can be achieved without causing further harm. The appellate process can, without proper attention, detract from both the speed and stability that are the twin goals of the Convention. An unsuccessful appeal of a return order that forces a child to remain in the United States can, if the process is prolonged, exacerbate the trauma, uncertainty, and frustration that the Convention is intended to prevent. On the other hand, a successful appeal can result in upheaval if the child has already returned to the alleged country of habitual residence by the time the appellate court overturns the return order.

NCMEC therefore urges the Court to make clear to lower courts the need to consider carefully whether to issue a stay pending appeal and, in particular, the appropriate length of such a stay. In NCMEC's view, even if a district court denies a responding parent's motion for stay pending the entire duration of appeal, it should nevertheless permit a brief, virtually automatic stay sufficient to permit recourse to an appellate court. While some district courts already follow this course, no rule requires them to do so. Adoption of a uniform automatic brief stay period by custom or otherwise would further the Convention's aims and be in the best interests of children. In addition, courts of appeals should seek to expedite their consideration of Convention appeals. While a child's return does not moot a Convention appeal, the courts must nonetheless be attentive to the impact of the appeal, and any stay pending appeal, in order to honor the Convention's balance between speed and stability.

ARGUMENT

I. A CHILD'S DEPARTURE FROM THE UNITED STATES PURSUANT TO A HAGUE CONVENTION RETURN ORDER DOES NOT MOOT AN APPEAL FROM THAT ORDER

A. ICARA Creates An *In Personam* Cause Of Action For Seeking A Child's Return Under The Convention

The central purpose of the Hague Convention is to remedy and prevent the problem of international child abduction. See Convention Preamble; Elisa Pérez-Vera, *Explanatory Report: Hague Conference on Private International Law*, 3 Acts and Documents of the

14th Session, §§ 16, 25 (1980) (translation of the Permanent Bureau) ("Pérez-Vera Report").[2] The Convention establishes a uniform set of procedures to be employed when a child is abducted from one Contracting State to another. See Convention Arts. 1, 12; United States Dep't of State, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494, 10505 (Mar. 26, 1986) ("Text and Legal Analysis").

"The Convention's central operating feature is the return remedy." *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1989 (2010). When a child has been "wrongfully removed to or retained in" a Contracting State other than his or her country of habitual residence, that State must "order the return of the child forthwith," unless certain exceptions apply. Convention Arts. 1, 3, 12. The Convention and its return remedy "do[] not alter the pre-abduction allocation of custody rights." *Abbott*, 130 S. Ct. at 1989. Judicial and administrative authorities considering Convention cases may not consider the merits of an underlying custody dispute, but may simply determine the jurisdiction in which a custody dispute is to be heard. See Convention Arts. 16, 19; 42 U.S.C. 11601(b)(4).

The Convention is implemented in the United States by the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. 11601 *et seq.* Under ICARA,

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[2] The Pérez-Vera Report is recognized as an authoritative source for interpreting the Convention's provisions and as "the official history and commentary on the Convention." *Croll* v. *Croll*, 229 F.3d 133, 137 n.3 (2d Cir. 2000), cert. denied, 534 U.S. 949 (2001).

when a child is removed to or retained in the United States, a left-behind parent may "commenc[e] a civil action by filing a petition" for the child's return in a state or federal court with "jurisdiction in the place where the child is located at the time the petition is filed." 42 U.S.C. 11603(a), (b) (providing that); see Text and Legal Analysis, 51 Fed. Reg. at 10507; Convention Arts. 8-9.[3]

Such civil actions for the return of a child under the Convention are treated by statute and in practice as *in personam* actions by one parent against the other. See Text and Legal Analysis, 51 Fed. Reg. at 10512. Thus, notice of such civil actions is given "in accordance with the applicable law governing notice in interstate child custody proceedings." 42 U.S.C. 11603(c). The burdens of proof borne by each side are set forth by statute. 42 U.S.C. 11603(e). Where the requesting parent proves that the child was wrongfully removed or retained within the meaning of the Convention, and the defending parent fails to prove the application of an exception, the court will grant the petition and issue a return order. Convention Art. 12; 42 U.S.C. 11603(e).

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[3] The left-behind parent may also petition the Central Authority of the child's country of habitual residence or the U.S. Department of State. Petitions received by foreign Central Authorities are transmitted to the U.S. Department of State. Convention Art. 9. The Department of State, with the aid of both governmental and non-governmental agencies, including NCMEC, endeavors to locate the abducted child in the United States and, if requested, find *pro bono* legal representation for the left-behind parent. See NCMEC, Litigating International Child Abduction Cases Under the Hague Convention 3-5 (2012) ("NCMEC Guide"), http://www.ncmec.org/en_US/HagueLitigationGuide/hague-litigation-guide.pdf (last visited Sept. 28, 2012).

B. It Is Very Common That The Petitioning Parent Will Leave The United States With The Child As Soon As The District Court Enters A Return Order, Before Any Appeal Is Commenced

Once a district court enters a return order, the petitioning parent may, consistent with ICARA and the Convention, immediately return with the child to the country of habitual residence, unless the court's order is stayed. When the petitioning parent has physical custody of the child, a return order is effectively self-executing; that parent does not need to obtain anything further from the defending parent in order to carry out the court's order by departing with the child. Even if the child is in the custody of the responding parent, a court order directing that parent to release the child to the petitioning parent would constitute an injunction with immediate legal effect. Federal Rule of Civil Procedure 62(a), which generally imposes an automatic 14-day stay of a district court's judgment, does not apply to an "interlocutory or final judgment in an action for an injunction."[4] See Fed. R. Civ. P. 62(a) ("[N]o execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have passed after its entry."); *id.* at 62(a)(1) (excepting orders granting injunctive relief from automatic stay).

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[4] The same is true of Rule 62(d); an appellant may obtain a stay of a judgment including a money award by giving a supersedeas bond, but not an injunction. See Fed. R. Civ. P. 62(d) (exempting injunction actions described under Rule 62(a)(1)); 11 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2905 (2d ed. 2012).

Full, or even partial, stays of return orders pending appeal are frequently denied. Some courts disfavor stays pending appeal as contrary to the purposes of the Convention. See *Friedrich* v. *Friedrich*, 78 F.3d 1060, 1063 n.1 (6th Cir. 1996). And, even aside from any special considerations in the Convention context, the burden for obtaining a stay of an injunction pending appeal is "a heavy one." Wright & Miller, Federal Practice & Procedure § 2904 (describing standard and collecting cases). Because such cases "are excepted from the automatic stay of Rule 62(a)," courts and commentators have explained that "the court should not grant a stay in these cases as a matter of course but should consider carefully the harm that a stay might cause to the party who has obtained the judgment." *Id.* § 2902.[5]

In NCMEC's experience, it is common practice for the responding parent's counsel immediately to move for a stay of the return order pending appeal. See Fed. R. Civ. P. 62; Fed. R. App. P. 8. It is also common practice for the petitioning parent's counsel to prepare for the child to leave the United States immediately upon denial of such motion. See NCMEC Guide at 86-87, 91. Thus, in many cases, as in the case presently before the Court, a respondent facing denial of a motion for stay

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[5] Courts considering whether to stay a return order most often do so pursuant to Rule 62(c), which provides for an injunction pending appeal from an order or judgment that grants or denies an injunction. See, *e.g.*, *Haimdas* v. *Haimdas*, 720 F. Supp. 2d 183, 210-212 (E.D.N.Y. 2010); *Rowe* v. *Vargason*, No. 11-1966, 2011 WL 6151523, at *1 (D. Minn. Dec. 9, 2011). Those courts have noted the "difficult burden" faced by the party seeking the stay. *Haimdas*, 720 F. Supp. 2d at 210; accord *Rowe*, 2011 WL 6151523, at *1.

will be unable to seek appellate relief before the child departs the United States pursuant to the return order.

C. A Child's Return Does Not End Convention Proceedings, Interrupt A Respondent's Ability To Obtain Effective Relief, Or Oust The Jurisdiction Of United States Courts

The departure of a child from the United States pursuant to a duly issued return order does not moot the underlying Convention case. The court of appeals held that petitioner's appeal was moot on the premise that, after the child's departure, the parent's only remedies would be in the country to which the child was returned and that "a reversal of the district court's order [would] provide * * * no actual affirmative relief." *Bekier* v. *Bekier*, 248 F.3d 1051, 1053-1055 (11th Cir. 2001); Pet. App. 1-2 (relying on *Bekier*). Since the *Bekier* decision, its reasoning has been expressly rejected by the three courts of appeals that have squarely considered the issue. See *Larbie* v. *Larbie*, 690 F.3d 295, 304-306 (5th Cir. 2012); *Whiting* v. *Krassner*, 391 F.3d 540, 545-546 (3d Cir. 2004), cert denied, 545 U.S. 1131 (2005); *Fawcett* v. *McRoberts*, 326 F.3d 491, 495-497 (4th Cir. 2003), abrogated on other grounds by *Abbott*, 130 S. Ct. at 1983.[6] This Court should likewise reject the court of appeals' holding. As explained below, noth-

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[6] The Tenth Circuit has reasoned in dicta that the departure of a child from the United States does not support dismissal of proceedings. See *Ohlander* v. *Larson*, 114 F.3d 1531, 1538-1539 (1997), cert. denied, 522 U.S. 1052 (1998). In contrast, the Sixth Circuit has suggested in dicta that stays of return orders may be necessary in order to preserve appellate jurisdiction. See *March* v. *Levine*, 249 F.3d 462, 468 (2001), cert. denied, 534 U.S. 1080 (2002).

ing in the Convention or ICARA supports the conclusion that a child's departure eliminates the justiciable controversy between the parents over whether the child's country of habitual residence is the United States or elsewhere. The court's jurisdiction does not depend upon the presence of the child, and reversal of an erroneous district court opinion will provide the appellant with significant, even if only partial, relief.

An appeal is not rendered moot simply because the appellate court cannot afford the appellant his preferred, or most expedient, form of relief. The doctrine of mootness derives from the constitutional limit on federal courts to adjudicate only "actual, ongoing controversies." *Honig* v. *Doe*, 484 U.S. 305, 317 (1988). A case is not moot, however, unless "it is impossible for a court to grant 'any effectual relief whatever to the prevailing party.'" *Knox* v. *Service Employees Int'l. Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (quoting *Erie* v. *Pap's A.M.*, 529 U.S. 277, 287 (2000)). "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Ellis* v. *Brotherhood of Railway Clerks*, 466 U.S. 435, 442 (1984). See *Church of Scientology* v. *United States*, 506 U.S. 9, 12-14 (1992) (availability of "partial remedy" is "sufficient to prevent [a] case from being moot").

Although an appellant's compliance with the order under appeal can moot the appeal in certain circumstances, ongoing effects of the court's order generally prevent the appeal from becoming moot. Where the court's order directs that a single action be taken which cannot be undone, compliance may forestall all possibility of effectual relief. See, *e.g.*, *Sierra Club* v. *Glickman*, 156 F.3d 606, 619 (5th Cir. 1998) (defendant vol-

untarily performed ordered consultation, which was only relief sought). Compliance will not moot an appeal, however, where that compliance may be undone and the *status quo ante* restored by order of the appellate court. See, *e.g.*, *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577, 2584 n.8 (2010) (removal of alien did not moot appeal of basis for removal, because, if he prevailed on appeal, alien could "still seek cancellation of removal even after having been removed"). Likewise, compliance will not moot an appeal where the order generates adverse collateral effects that could be prevented or undone by a favorable appellate ruling. See *Sibron* v. *New York*, 392 U.S. 40, 53-59 (1968) (collateral consequences of criminal conviction, following completion of sentence, avoided mootness); *Dailey* v. *Vought Aircraft Co.*, 141 F.3d 224, 226-229 (5th Cir. 1998) (continuing collateral consequences of lawyer's temporary disbarment, following payment of sanctions and readmission to practice, provided ongoing controversy).

1. The Convention's Text and Purpose Indicate That the Child's Return Does Not Moot an Appeal of the Return Order

Neither the text of the Convention nor that of ICARA supports the view that proceedings must terminate upon a child's exit from the United States. An action to obtain return of a child is not an *in rem* proceeding that depends on the child's presence for the exercise of jurisdiction. On the contrary, the Convention expressly contemplates continuation of proceedings in the absence of the child. Nor does anything in the Convention or ICARA preclude post-departure appellate relief from being given effect. In fact, many countries

and commentators expressly contemplate return of the child if the district court's order is reversed.

The court of appeals' dismissal cannot be based on any rule that the child's continued presence in the United States is necessary for the exercise of jurisdiction. The civil action under ICARA seeking a child's return is an *in personam* cause of action in which the petitioning parent files suit in state or federal court to establish the right to return a child to the alleged country of habitual residence. If the petitioner prevails by establishing that the child was taken from the country of habitual residence, the court grants the return order, and also ordinarily assesses against the respondent parent the petitioner's legal costs and fees, travel expenses, child care expenses, and costs incurred in locating the child, see 42 U.S.C. 11607(b)(3). The petitioner thus files suit to redress—with both injunctive and monetary relief—a very specific wrong done by the respondent: abducting the child from the child's place of habitual residence. The action is not some novel species of *in rem* action designed to establish any and all persons' rights in relation to a child, with respect to which the child's presence in the jurisdiction might be essential to jurisdiction. Indeed, an action for return of a child does *not* resolve any disputes over the custody of the child. Convention Art. 16. Although ICARA requires that a return action be brought in a court of competent jurisdiction "in the place where the child is located at the time the petition is filed," see 42 U.S.C. 11603(b), that is only a venue provision, and only requires the presence of the child "at the time the petition is filed," *ibid.* The court's jurisdiction is based up-

on 42 U.S.C. 11603(a), which does not refer to the presence of the child.

The text of the Convention also makes clear that the child's presence in the United States throughout the pendency of the litigation is not necessary to maintain jurisdiction.[7] Article 12 specifically contemplates that proceedings under the Convention may continue, despite the departure of the child during the pendency of those proceedings. "Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it *may stay the proceedings or dismiss the application* for the return of the child." Convention Art. 12 (emphasis added). The option to stay, as an alternative to dismissal, presumes that the child's departure does not oust the jurisdiction of a court, and that a court may continue to exercise jurisdiction notwithstanding the child's absence. As evidenced by the use of the permissive "may" in Article 12, the decision whether to exercise continued jurisdiction when a child has departed the State is ultimately committed to the discretion of the judicial or administrative authority.[8]

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[7] Resolution of an issue under a treaty necessarily "begin[s] with the text of the treaty and the context in which the written words are used." *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 534 (1991) (internal quotations omitted). "[The Court] may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Air France* v. *Saks*, 470 U.S. 392, 396 (1985).

[8] Article 12's permissive, disjunctive phrasing ("may stay the proceedings or dismiss the application") is arguably ambiguous as to whether an authority's options to stay or dismiss are exclusive of the option to continue proceedings. The Court must therefore

The views of commentators and foreign courts further confirm that nothing in the Convention, or the nature of a return proceeding, precludes a court from continuing to exercise jurisdiction after the child has departed the requested state. Indeed, these authorities have specifically recognized the availability of appellate jurisdiction over a return order after the child has departed the State. Participants at the Second Special Commission Meeting to Review Operation of the Hague Convention on the Civil Aspects of Child Abduction (a meeting of official representatives with particular expertise in implementing and construing the Convention) discussed "the possible complications which could arise from return of a child while the appeal was pending, in case the appeal should be successful." Hague Conference on Private Int'l Law, 33 I.L.M. 225, 233 (1994). Participants discussed several ways in which a successful appeal might be given effect, including through agreements amongst Central Authorities to enforce re-return orders. *Ibid.* Similarly, the Hague Conference General Affairs Council has presumed the existence of post-return appeals, advising Contracting States that they should indicate "the effect

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look to the larger context of the Convention to determine Article 12's meaning. See *De Sylva* v. *Ballentine*, 351 U.S. 570, 573 (1956) ("The [disjunctive phrase of a statute] is hardly unambiguous, however, and presents problems of interpretation not solved by literal application of words as they are 'normally' used."); *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 700 (1988) (treaties "are construed more liberally than private agreements" and "general rules of construction may be brought to bear on difficult or ambiguous passages"). For the reasons given *supra* at Section I.C, this context weighs in favor of permitting active proceedings in the child's absence.

of lodging an appeal against a return order" and whether "the return order [will] be stayed while an appeal is pending." Permanent Bureau of the Hague Conference on Private International Law, Guide to Good Practice Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II – Implementing Measures § 6.6 (2003). See also *id.* at Part IV – Enforcement § 3.2 ("The possibility of * * * provisional enforceability of a return order which is not yet final should nevertheless exist in order to respond appropriately to the circumstances of each case.").

Accordingly, the one foreign court of which NCMEC is aware to have considered whether the Convention permits post-return appeals concluded that the Convention does permit post-return appeals. In 2002, Spain's high court on constitutional matters held that Convention cases are not mooted by departure of a child pursuant to a court-issued return order, since courts in the new jurisdiction might enforce a Spanish order for re-return of the child. S.T.C., May 20, 2002, (BOE No. 146) (INCADAT HC/E/ES 907). At least two additional foreign jurisdictions, the Netherlands and France, reportedly also hear Convention appeals notwithstanding the child's return. See Nigel Lowe, Good Practice Report on Enforcement Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction §§ 3.3.3, 3.5.7 (2007).

This interpretation of the Convention accords with its purposes. A rule that a child's departure deprives the court of jurisdiction over a return proceeding would encourage the very behavior the Convention was designed to prevent: the flight of parents in search of a

more favorable jurisdiction. See *Ohlander*, 114 F.3d at 1538-1539; Pérez-Vera Report § 11.

Moreover, it is likely that some courts would respond to this rule by staying return orders during the entirety of an appeal, even when a stay would not be in the child's interest. The availability of appellate review of return orders is desirable. The potential exists for district court error in Convention cases no less than in other civil proceedings. Convention cases are by no means simple; courts must work within tight timeframes to resolve complicated factual and legal disputes, sometimes regarding foreign law. See, *e.g.*, *In re Application of Adan*, 437 F.3d 381 (3d Cir. 2006) (reversing district court's return order based, in part, on misinterpretation of Argentine law), remanded to 2007 WL 1850910 (D.N.J. 2007), rev'd 544 F.3d 542 (3d Cir. 2008). Yet appeals in Convention cases sometimes lack merit and reflect an emotional appeal as much as dispassionate legal assessment. In some cases, where an appeal seems clearly to lack merit, the prompt return of the child during the pendency of the appeal best accords with the Convention's purpose: "to secure the *prompt* return of children wrongfully removed to or retained in any contracting State." Convention Art. 1(a) (emphasis added). If immediate return of the child would altogether preclude appellate review, however, some courts might be disinclined to permit the departure. By recognizing that an appeal can go forward, even after the child's departure, the Court would permit case-specific determinations that best further the Convention's purposes. See *infra* Section II.

2. *The Court of Appeals' Rule Disregards the Availability of Effectual Appellate Relief, Even After the Child's Departure*

Although the court of appeals' reasoning is not clear, it may have believed that the child's return to the requesting State mooted any appeal because it would prevent the court of appeals from granting any effective relief to the appellant. But that is not correct. A responding parent who succeeds in obtaining a reversal on appeal could obtain many forms of relief notwithstanding the child's departure.

Most obviously, the court of appeals, or district court on remand, could order the petitioning parent to bring the child back, and the parent might voluntarily comply with the court's order. See *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 289 (1952) ("[A district court] may command persons properly before it to cease or perform acts outside its territorial jurisdiction."); *Fawcett*, 326 F.3d at 496; *Larbie*, 690 F.3d at 305-306. Having initiated an action before the district court, the petitioning parent has subjected herself to that court's jurisdiction, and cannot dispute the court's authority to order her to undo the effects of an erroneous order in her favor. Cf. *Adam* v. *Saenger*, 303 U.S. 59 (1938) (holding that, by initiating suit, a plaintiff subjects itself to the court's jurisdiction and to orders relating to the subject matter of the suit, including counterclaims). Voluntary compliance could be attractive against the alternative of a civil contempt order, particularly for a petitioner holding assets subject to seizure in the United States, or wishing to travel in the United States in the future without fear of potential arrest. See 18

U.S.C. 401(3); *Fawcett*, 326 F.3d at 496; *Ohlander*, 114 F.3d at 1535.

Second, even if the petitioner does not voluntarily re-return the child, a prevailing respondent might request that the State Department attempt to secure re-return of the child in cooperation with the Central Authority of the state of residence.[9] See Convention Art. 7 (setting out the general duty of Central Authorities to co-operate, so as to ensure the Convention's objects are achieved). Cf. *Lindland* v. *United States Wrestling Ass'n*, 227 F.3d 1000, 1002 (7th Cir. 2000) (case not moot where effective relief required voluntary compliance of foreign tribunal); *Blondin* v. *Dubois*, 189 F.3d 240 (2d Cir. 1999) (ordering district court to request State Department to cooperate with the Central Authority of France to facilitate a return to France subject to certain protective conditions).

Prevailing on appeal would also relieve a respondent from an order to pay certain costs assessed under the Convention. A respondent who has lost in the trial court may have been assessed liability for a petitioner's legal costs and fees, travel expenses, child care expenses, and costs incurred in locating the child. See Convention Art. 26; 42 U.S.C. 11607(b)(3) (directing any court ordering return of a child to assess such expenses against respondent "unless the respondent establishes

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[9] This solution was recognized as proper and potentially effective at the Second Special Commission Meeting to Review the Operation of the Convention. See *supra* Section I.C.1; 33 I.L.M. at 233 (several experts "thought that the Central Authority in the State to which the child was returned would, if possible, give effect to the appellate decision").

that such order would be clearly inappropriate"). Regardless of the presence or absence of the child in the United States, prevailing on appeal would require that the trial or appellate court vacate any such order and relieve the respondent of the obligation to pay these costs.[10]

Finally, prevailing upon appeal frees a respondent from the Convention's bar on custody actions in the Contracting State to which a child has been removed. Convention Art. 16. Having established on appeal that the child should not have been returned, a respondent could in most states[11] commence a custody action under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), even if the child has left the country. See UCCJEA §§ 102(7), 105, 201 (custody action may be commenced over an absent child in a foreign country if the child lived in the jurisdiction for six consecutive months immediately before commencement of proceedings). A respondent with a favorable Convention judgment on habitual residence and wrongful removal would enter such proceedings with a significant head-start toward establishing the jurisdictional prerequisites to an action under the UCCJEA. See *Krymko* v. *Krymko*, 32 A.D.3d 941, 942-943 (N.Y. App. Div. 2006) (period of "wrongful removal" under the Convention equivalent to period of "temporary ab-

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[10] In NCMEC's experience, such expenses are often substantial (particularly the costs of last-minute international travel). See *Whiting*, 391 F.3d at 546; NCMEC Guide at 102. No such costs were sought or assessed in this case, however.

[11] Forty-nine states (every state except Massachusetts) have adopted the UCCJEA.

sence" and not counted against six-month consecutive residence requirement under UCCJEA § 102(7)). And, ultimately, a respondent with a UCCJEA custody order might attempt to seek international enforcement of that order, depending on the country where the child is then located.[12]

As the foregoing demonstrates, a defending parent who successfully overturns a return order may obtain both direct and collateral relief through numerous potential avenues. The court of appeals' apparent belief that any decision vacating and reversing the return order would be futile and of no value to the appellant does not withstand scrutiny. Because a favorable ruling on appeal would have afforded the appellant considerable relief, the court of appeals' ruling was in error and should be reversed.

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[12] In NCMEC's experience, it is possible for a UCCJEA custody order to be enforced in foreign countries, although the chance of success varies widely from country to country. See, *e.g.*, *Thomas* v. *Arul*, (2011) 5 C.T.C. 22 (India) (enforcing custody order issued by United States court while child was in India); Child Custody and Right of Access Act 361/1983 § 18 [Finland] (providing procedures for registration of international custody orders). NCMEC is also aware of parents succeeding in enforcing United States custody orders in Europe under principles of the so-called "Brussels II" treaty, a European Union pact to which the United States is not a signatory. See Council Regulation (EC) No. 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility.

II. Because Lengthy Appeals, Especially After The Child's Return, Conflict With The Convention's Purposes And Cause Further Harm To The Child, Courts Should Act To Mitigate These Harms

A. Abducted Children Face Untold Hardships Which The Convention Is Designed To Mitigate And Prevent

Abducted children confront a range of psychological, physical, and social hardships. Removed from their familiar environment, usually as a result of the failed adult relationships around them, abducted children find themselves thrust into strange cultures in strange lands. NCMEC, Family Abduction Prevention and Response 135-137 (2009) ("NCMEC Prevention and Response"); United States Dep't of State, Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction 7 (April 2009) ("Dep't of State 2009 Compliance Report"). Abductors frequently commit their children to a life on the run, prevent their children from making close friends, sometimes even changing their children's names, birthdates, or physical appearances to conceal their true identities. Dep't of State 2009 Compliance Report at 7. Research has found that abducted children suffer higher rates of abuse and a range of other problems, including anxiety, eating problems, and difficulty developing personal relationships. *Ibid.*; NCMEC Prevention and Response at 137. With the passage of enough time, abducted children may find that their relationship with the left-behind parent, as well as their connection to their previous culture and social group, have suffered. Dep't of State 2009 Compliance Report at 7; Pérez-Vera Report

§§ 29-30. These are the ills that the Convention was designed to mitigate and prevent.

The Convention is intended to protect children from the harms attendant to abduction and to do so in a procedural fashion consistent with their overall best interests. See Convention Preamble; Pérez-Vera Report §§ 24-34.[13] To this end, the Convention promotes the twin objects of discouraging would-be abductors from crossing international borders and securing the prompt reintegration of abducted children into their countries of habitual residence. See Pérez-Vera Report §§ 16, 18, 25. These objects are effectuated throughout the Convention's provisions, which are carefully structured to promote a balance between speed in resolving the action[14] and stability in the child's situation.[15] The

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[13] To be sure, the operative part of the Convention does not mention the best interests of children. See Pérez-Vera Report § 23. And it is implicit in Article 16 that the best interests of a particular child should not, apart from those circumstances specified in Article 13, govern the decision whether or not that child is returned under the Convention. See *Kufner* v. *Kufner*, 519 F.3d 33, 40 (1st Cir. 2008). But the Convention's treatment of "this point ought not to lead one to the conclusion that the Convention ignores * * * the interests of children." Pérez-Vera Report § 23. To the contrary, "right from the start the signatory States declare" that they "drew up the Convention, 'desiring to protect children internationally from the harmful effects of their wrongful removal or retention.' " *Ibid.* (quoting Convention Preamble).

[14] The importance of expeditious proceedings is emphasized in six separate Convention Articles. Convention Arts. 1, 2, 7, 9, 11, 12. Through these provisions, the Convention aims to "bring[] about speedy solutions so as to prevent the consolidation in law of initially unlawful factual situations, brought about by the removal or retention of a child." Pérez-Vera Report § 40. Closely related to the goal of speed is the Convention's effort to concentrate pro-

overall aim is that children should be returned to their habitual residences as quickly as can be achieved without causing further trauma, uncertainty, or frustration. See *id.* §§ 24-34. In adjudicating Convention cases, including on appeal, courts should be attentive to these precepts and purposes of the Convention.

B. Prolonged Appeals, Especially Post-Return, Can Cause Further Trauma, Uncertainty, And Frustration In The Lives Of Abducted Children

Prolonged appeals, which are unfortunately common in Convention cases, undermine the purposes of the Convention, whether or not the child's return is stayed.

In a case where a full stay is granted, the child will remain in the United States during the entire course of

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ceedings in the judicial and administrative authorities of the child's country of residence. See Convention Arts. 9, 12; Pérez-Vera Report § 111.

[15] Three Convention Articles emphasize the importance of stability and the prevention of further harm, by creating exceptions to the general rule for return of the child. See Convention Art. 12 (mandatory exception to return where more than one year has elapsed since removal and child is settled in new environment); *id.* at Art. 13 (discretionary exceptions to return where left-behind parent acquiesced in removal or retention, where return poses a "grave risk" of harm or other "intolerable situation," or where child of sufficient age and maturity objects to return); *id.* at Art. 20 (discretionary exception to return where the requested State's "fundamental principles" of "human rights and fundamental freedoms" do not permit return). Each exception may add length and complication to proceedings, see NCMEC Guide at 37-65; Pérez-Vera Report §§ 9, 109, but is nonetheless critical to the Convention's framework.

appellate proceedings—occasionally even in the care of a child protective services agency, see NCMEC Guide at 74-75. In 2008, appeals added an average of 232 days to incoming Convention cases in the United States. A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III – National Reports 207 (May 2011) ("2008 Statistical Analysis"). For a child eventually returned, a delay of this length only prolongs the period of uncertainty, renders the subsequent return and reintegration more difficult, and complicates the subsequent adjudication of custody by the foreign court. See *Friedrich* v. *Friedrich*, 78 F.3d 1060, 1063, n.1 (6th Cir. 1996). See also Convention Art. 11 (suggesting a period of six weeks from commencement of petition to final decision in Hague Convention cases).[16]

The situation can be equally difficult where no stay whatsoever is granted, and the child departs the United States while the responding parent appeals. The possibility of appellate reversal (and the specter of a future re-return order to the United States) holds the child's status in limbo and complicates resettlement ef-

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[16] The slow course of appellate proceedings worldwide has long concerned observers of the Convention. See Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction § 3.3 (March 2001). Appellate proceedings in United States courts are no exception in this regard. See 2008 Statistical Analysis at 207 (noting a global average of 324 days to finalize cases that are appealed and a United States average of 441 days to finalize cases that are appealed).

forts. A foreign court may be uncertain of its own jurisdiction to commence custody proceedings, or reluctant to exercise such jurisdiction, prior to decision from the United States appellate court. See Convention Art. 16.[17] A child who departs but is later ordered to re-return to the United States may face further dislocation or instability as a result of a second international move.

C. A Brief Automatic Stay Period, As Already Used By Some Courts, Followed By An Expedited Appeal, Best Achieves The Balance Between Stability And Speed Sought By The Convention

For the reasons described above, either an indefinite stay pending a protracted appeal or a complete denial of any stay pending appeal can upset the Convention's careful balance between speed and stability, and ill-serve the interests of abducted children. In NCMEC's view, the Convention's purposes would be better served if courts routinely granted respondents a brief stay during which to move the appeals court to grant expedited treatment of the appeal and, if appropriate, a further brief stay pending appeal.

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[17] Article 16, which limits custody proceedings in the country "to which the child has been removed or in which it has been retained," would not technically limit foreign jurisdiction to commence a custody case in this situation. For instance, a custody action related to this case was apparently commenced in a Scottish court prior to the court of appeals' dismissal of the Convention appeal as moot. The existence of potentially conflicting, simultaneous court proceedings in two different countries is nevertheless at odds with the purposes of the Convention.

To be effective, a temporary stay from the district court need only be long enough to permit a respondent to seek relief from the court of appeals pursuant to Fed. R. App. P. 8.[18] A respondent is thereby afforded an abbreviated but meaningful opportunity to convince a new judge of the substantial merit of his position. Where an appeal has merit, and the child is reasonably likely to remain in the United States, the appellate court may stay execution of the return order, allowing the proceeding to continue in the way that causes the least amount of disruption, harm, and procedural uncertainty. Conversely, where the appeal lacks merit, the appellate court may permit immediate execution of the return order, and the petitioner and child may move on with their lives with diminished concern that those lives will be upended by the ongoing proceedings in the United States. A stay of this nature thus permits appellate review without undue delay, serving the goals of the Convention and the interests of petitioners, respondents, and abducted children.

There is presently no rule or statute requiring or encouraging district courts to grant brief stays of return orders. Some courts have granted such stays. See, *e.g.*, *March* v. *Levine*, 136 F. Supp. 2d 831, 861 (M.D. Tenn. 2000), aff'd, 249 F.3d 462 (6th Cir. 2001), cert. denied 534 U.S. 1080 (2002) (stay of six days to permit appeal to Sixth Circuit); *Haimdas* v. *Haimdas*, 720 F. Supp. 2d 183, 213 (E.D.N.Y. 2010) (stay of one

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[18] NCMEC does not support a mandatory stay period for the duration of appeal for the reasons explained *supra* at Section II.B. In addition to those reasons, a full mandatory stay period could also create unacceptable tactical opportunity for abductors to cause additional delay.

month "for the purpose of permitting respondent to apply to the Second Circuit Court of Appeals for an emergency stay pending appeal and an expedited appeal"); *Charalambous* v. *Charalambous*, 744 F. Supp. 2d 375, 379 (D. Me. 2010) ("Absent a stay of judgment, Respondent separately seeks an extension of this deadline in order to allow her to seek a stay from the First Circuit. In the Court's assessment, this is a reasonable request."). Other courts—such as the district court below—refuse to do so. It is NCMEC's belief that abducted children, practitioners, and judges would all be served by a uniform rule in favor of such brief stays to permit initial consideration of the case by the appellate court.

In the absence of a formal rule, NCMEC respectfully suggests that this Court might encourage the lower courts to grant such brief stays pursuant to their authority under ICARA. See 42 U.S.C. 11604 (providing that courts hearing a Convention case "may take * * * measure[s] * * * as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition"). Similarly, the Advisory Committee on Civil Rules might consider in the future whether to amend Fed. R. Civ. P. 62 to bring Convention judgments within the 14-day automatic stay period of subpart (a).[19] Through either of these means, the Convention's purposes might best be achieved: allowing for

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[19] The Department of State, too, might adopt regulations pursuant to 42 U.S.C. 11606 to accomplish the same end. But the underlying questions of judicial administration and economy are, in many respects, best suited for determination by the judiciary.

correction of errors on appeal—as both the Convention and our principles of justiciability permit, regardless of the presence of the child in the United States—while also resolving these disputes "us[ing] the most expeditious procedures available." Convention Art. 2.

CONCLUSION

The judgment of the Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted.

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